Proceedings —

A SYMPOSIUM on REVISION of CALIFORNIA'S PUBLIC EMPLOYEE BARGAINING LAWS

Sponsored by

Institute of Industrial Relations — Berkeley
Institute of Governmental Studies — Berkeley
Institute of Industrial Relations — Los Angeles

of the

University of California

May 24–25, 1973
San Francisco Airport

PROCEEDINGS

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EDITOR'S NOTE

On March 15, 1973, the Advisory Council on Public Employee Relations submitted its 314-page report and recommendations to the State Assembly. The bill based on this report and the several other bills before the Legislature propose a variety of changes in the current laws governing employee relations in the California public sector. Owing to widespread interest among management and employee representatives in the field, the Institutes of Industrial Relations at Berkeley and Los Angeles and the Institute of Governmental Studies at Berkeley organized a day-and-a-half conference designed to provide a forum for consideration of alternative legislative proposals.

At the opening session on the afternoon of May 24, four nationally known experts reviewed and analyzed the issues which arise in major problem areas. The following day, May 25, participants were divided into six discussion groups to consider the contributions of the main speakers on legislative possibilities and to add their own views. At the end of the day, the entire group met in general session to hear the reactions of the main speakers to the group discussions and the reports of discussion leaders.

The proceedings which follow are a complete transcript of all general sessions, including the dinner address of Jacob Finkelman, Chairman of the Canadian Public Service Staff Relations Board. Minor editorial modifications have been approved by the speakers.

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THE PROPOSED STATUTE AND ADMINISTERING AGENCY: COVERAGE AND IMPLEMENTATION OF RIGHTS

Reginald H. Alleyne, Jr.
Professor of Law, UCLA
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A labor management relations policy without governing rules, or without a neutral agency to resolve questions arising under the rules, would be something like a baseball game without rules, or one with rules but no umpire. In that event, the competing teams might decide on a game-by-game basis what the governing rules ought to be, and how balls and strikes should be called. They might also engage in an unrestrained brawl.

It is quite possible to set up a collective bargaining scheme that provides for various types of unfair labor practices, representation unit criteria, and a neutral agency as decision-maker. It is also possible to do what some of our local California jurisdictions have done, namely, to establish an employer-employee relations administrative policy without providing for a neutral agency to determine when and under what circumstances either of the parties had violated the policy. Where we find that kind of legislation, we find that representation-unit decisions are often made by those who are deeply involved in the negotiations process. That procedure can be faulted in two respects: (1) the decision-maker may in fact be partial and (2) the decision-maker does not have the appearance of impartiality.

I think that in analyzing a collective bargaining statute like the Moretti Bill, we should note that the entire administrative procedure is no stronger than its weakest link. The weakest of all possible links in a public sector collective bargaining law would be the creation of an adminis-

trative agency that is either partial or that gives the appearance of not being partial. In that vein, I would like to discuss how agency members under the various proposed public employee relations bills are selected; how the agency's independence is protected; what kinds of cases the agency is empowered to review and resolve; the types of orders an agency might be able to issue; and how those orders are reviewed in the courts. Finally, I might comment on the immensely complex problem of state versus local jurisdiction over these matters. I would like to focus on the Moretti Bill and compare it with other bills now before the Legislature for consideration.

First, on the question of how the agency members will be selected, the Moretti Bill proposes that the three members of the Public Employee Relations Board be selected by the Governor of California from a list of 12 nominees selected by three persons: The Director of the State Conciliation Service, the Chief Justice of California, and the President of the American Arbitration Association. As the Advisory Council's report indicates, the reasoning is to remove the Governor from the pressures of partisan politics that would inevitably be brought to bear upon him in appointing members of the Board. So important is the concept of independent labor relations agencies that at the national level, where the NLRB appointment process is entirely unilateral, President Nixon, in his last two appointments to the National Labor Relations Board, chose career NLRB employees as Board members.

We might briefly consider what other means of selecting Public Employee Relations Board members might have been proposed. In New York, the Governor of that state is only constrained by the requirement that he not select more than two members of the three-man Public Employee Relations Board from the same political party. Another type of selection process is that found in

County and City legislation in Los Angeles, where the Los Angeles County Employee Relations Commission is composed of three members selected by the Board of Supervisors from a list of nominees submitted by the County Management Council and the Los Angeles County Federation of Labor. Members of the Los Angeles City Employee Relations Board are appointed in similar fashion. Another possibility, and one that was emphatically rejected by the Advisory Council, is the tripartite agency, typified by the composition of the New York City Office of Collective Bargaining. New York City's OCB is composed of three city representatives, three union representatives, and three public members who are selected mutually by the six partisan members of the Board.

I note that none of the other bills called to my attention make any attempt to assure a board composed of independent labor relations professionals. Each one provides for a unilateral gubernatorial appointment to the proposed governing agency.

Next, what are the subjects over which the proposed Public Employee Relations Board may exercise jurisdiction? Generally, the Moretti Bill provides that the Board may hear and resolve issues arising under the unfair practice charges as defined in the bill and to resolve representation unit issues. The bill defines unfair practices:

> Basically, the employer is prohibited from refusing to fail to negotiate in good faith with a certified employee organization; from dominating or interfering with the formation or administration of an employee organization and from discriminating against an employee because the employee engages in or refuses to engage in union activity. Labor unions are also constrained by the bill's unfair practice section. They are prohibited from interfering with an employee's right to refrain from engaging in union activity; likewise a union is also prohibited from refusing to bargain in good faith with an employer.

What subjects might be excluded from the general class of unfair practices as defined in the Moretti Bill? First, the bill contains a statutory time bar. It provides that no charge may be entertained by the Public Employee Relations Board unless that charge is filed within six months after the event or events giving rise to the charge. This time frame is consistent with that found in the National Labor Relations Act. The purpose of this exclusion is to prevent the Board from handling charges that might be stale because of the passage of time and the resultant unavailability of witnesses or inability of available witnesses to recollect events.

Next, the Moretti Bill, unlike any other so far introduced, contains a provision prohibiting the Public Employee Relations Board from processing an unfair practice charge when the subject of that charge is also the subject of a collective bargaining agreement between the public employer and a union. This is known as the doctrine of arbitral deferral. The National Labor Relations Board by a consistent 3-2 decision follows this practice of deferring to an arbitrator in certain cases. The NLRB does not follow a deferral policy because the National Labor Relations Act commands it to do so; it has chosen to exercise what it regards as its discretion under the National Labor Relations Act to follow a policy of deferral. The Board does so generally for the reasons similar to those set out in the Advisory Council's report, namely: (1) The grievance machinery is the means chosen and devised by the parties themselves to settle these disputes; therefore, the parties ought to employ it. (2) Grievances may be settled more quickly under grievance arbitration procedures than they might be under the unfair practice procedures of the Public Employee Relations Board. (3) The Public Employee Relations Board will probably have a fairly heavy caseload, and the use by the parties of their own grievance procedures will help to ease that

load.

It is difficult to find fault with the first reason. Certainly if the parties devise a grievance arbitration procedure in their collective bargaining agreement, then perhaps they ought to use that private means of settling their dispute before resorting to the public remedy afforded by a Public Employee Relations Board. The second reason, the time advantage, might prove in the long run not to be as advantageous as it might now appear to be. The number of cases going to arbitration under grievance arbitration clauses in collective bargaining agreements, is on the increase. At the same time, the number of acceptable arbitrators available to hear these cases has not increased during the last two decades. While efforts are being made to train new arbitrators, those efforts are only at the beginning stage and might not at this time be deemed successful. As a result, those few arbitrators who handle the bulk of grievance arbitration cases are becoming busier and busier. The average time between the filing of a grievance and the arbitrator's award is increasing dramatically. It is not terribly uncommon for an arbitrator to take one year or more to render an award. Also possibly detracting from a favorable time advantage is the possibility that the new Public Employee Relations Board may use valuable time deciding in a particular case whether it is one that is appropriate for the exercise of the deferral policy. In short, it might well be that the Board will find itself spending much time in order to save a little time.

The Moretti Bill also contains an exception to the deferral requirement. It provides that "when the charging party demonstrates that resort to the contract grievance procedure would be futile, exhaustion [of the contracts grievance procedure] shall not be necessary." This exception

will of course raise the issue of what is "futile" within the meaning of the exception to the deferral policy. For example, under the futility exception, will resort to advisory arbitration be regarded as futile? If not, a party may find that when the collective bargaining agreement contains language similar to the language found in the unfair practice sections of the law, that party may be compelled to defer to an advisory arbitrator who would render an advisory award which, if against the employer, might then be rejected. Only after resorting to that procedure, where the grieving employee might win the battle before the arbitrator but lose the war when the employer rejects the advisory award, would the employee be permitted to use the procedures of the Public Employee Relations Board.

On the other hand, if the futility exception applies to all advisory grievance arbitration procedures, then the employee would not be compelled to use that procedure before resorting to a public remedy with the Public Employee Relations Board. In that event, the Board might find itself not deferring to arbitration in the overwhelming majority of cases where deferral might otherwise be in order, thus defeating the stated objectives of the deferral policy.

Given the choice, as provided in the Moretti Bill, of negotiating an agreement containing a final and binding grievance arbitration clause or an advisory arbitration clause, most negotiated contracts if not virtually all of them will very likely contain advisory arbitration clauses. My experience as a Commissioner and member of the Los Angeles County Employee Relations Commission is that virtually no unions are able to successfully negotiate for a final and binding grievance arbitration clause when, under existing law, as is the case under the Los Angeles County Employee Relations

Ordinance, the employer is free to negotiate an advisory grievance arbitration clause. To date, in Los Angeles County, not a single negotiated contract of the 36 that have been negotiated, contains a final and binding grievance arbitration clause. If, on the other hand, the Moretti Bill provided, as does the Los Angeles City Employee Relations Ordinance, and many other public sector laws, for final and binding arbitration in all cases where a grievance arbitration clause is written into a collective bargaining agreement, then the deferral policy provided by the Moretti legislation would very likely achieve its objectives.

The problem of administering a deferral policy in the presence of contracts providing for advisory rather than final and binding arbitration will be exacerbated considerably if the Public Employee Relations Board follows not only a policy of deferral to an arbitrator in those cases where the arbitrator has not had a chance to act, but also follows a policy of not allowing a party who has lost a case before an arbitrator to subsequently file an unfair practice charge raising the arbitrated issue with the Public Employee Relations Board. Under strict guidelines followed by the NLRB, and lately the Equal Employment Opportunity Commission, the practice of not allowing an administrative agency to be used for a second bite at the apple following an arbitration award unfavorable to the grievant is followed in the private sector.

If the proposed Public Employee Relations Board follows that policy under the Moretti Bill, we might see the following somewhat paradoxical result: An employee files a grievance pursuant to the advisory grievance arbitration clause contained in a collective bargaining agreement; the subject of the grievance is also a matter covered by the unfair practice section

of the Moretti Law; the employee wins the grievance before the advisory arbitrator; the employer rejects the award; the employee then files an unfair practice charge with the Public Employee Relations Board; the Board refuses to entertain the charge and dismisses it on arbitral exclusivity grounds.

In my judgment, advisory arbitration is not arbitration; it is like providing a World Series umpire with the power to call balls and strikes subject to the approval of the manager of the home team. Advisory arbitration, even when fair in fact, certainly does not give the impression that a case is being heard in a neutral forum, when it is known that should the employee win before the arbitrator, the employee will lose if the employer wants the employee to lose. While it may appear to be something of an overstatement, a statute disallowing grievance arbitration of any kind might be preferable to one permitting only advisory arbitration. A legal system which purports to be effective, but is in fact ineffective, demeans the high calling of the law by holding out false promises which frustrate its intended beneficiaries and defeats the real purpose of a law-and-order administrative scheme.

It is sometimes said that advisory arbitration is a compromise between no arbitration and final and binding grievance arbitration. To me, this is like taking a man who is drowning in six feet of water and compromising by holding his head under three feet of water. Ostensibly, there is a compromise; in reality, the "compromise" is illusory.

Another important class of exclusions from coverage may be found by examining the various proposed statutory definitions of "employer" and "employee". The Dills Bill, for example, excludes school districts, a

county board of education, and a county superintendent of schools from coverage, while the Moscone Bill, a substitute for the Winton Act, applies to all levels of public education and excludes all other public employees from coverage. The Moretti Bill excludes no public employees as a horizontal generic class, but does exclude supervisors and management employees from coverage. To that extent, the Moretti Bill is generally consistent with the National Labor Relations Act, although the statutory definitions of supervisors in the two measures differ in some detail.

Next, the kind of orders a labor relations agency is authorized to issue is important; closely connected is the question of how and under what circumstances the agency's decisions might be reviewed by the courts. The Moretti Bill authorizes the proposed Public Employee Relations Board to issue cease and desist orders. While these orders are not self-executing, they may be reviewed and enforced by courts. Most of the measures I have looked at contain some means of judicial enforcement of agency orders. The Moretti Bill provides for judicial review in a court of "competent jurisdiction". Typically, in California, agency decisions are reviewed by way of a writ of mandate in the superior court; and this is perhaps what is meant by a "court of competent jurisdiction" within the meaning of the Moretti Bill. Review of the proposed agency's decision in the Court of Appeal would of course, save time by omitting the Superior Court and permitting the agency decision to be reviewed on the record in the Court of Appeal. A decision of the Superior Court could be taken to the Court of Appeal, and from there to the California Supreme Court, in any event.

Next, in regard to state and local government relations, the Moretti Bill provides for local option. Local jurisdictions may establish or

maintain their own public employee labor relations laws so long as they are in "substantial compliance" with the provisions of the proposed state law. Only one substantial-compliance criterion is set out in the Moretti Bill, but it clearly is not meant to be the sole criterion: local laws must establish a board or commission comprised of impartial persons with experience in the field of employer-employee relations. Beyond that, it is not clear to what extent substantive decisions of the state agency will have to be followed by a local agency. Other bills are silent on the matter, and in my judgment, it must be assumed that silence on this subject is tantamount to a declaration that the state law preempts existing local legislation on the subject.

It does seem clear, that under either a preemptive law or a local option law requiring the local agency to comply with state agency decisions, it will not be possible for a local government manager to get around an adverse local agency decision by successfully lobbying the local legislative body for a change in the local law.

Finally, the Moretti Bill takes care of the sometimes difficult problem of inter-agency conflict and potential conflict between the provisions of collective bargaining agreements and local ordinances or charters by providing that Public Employee Relations Board decisions and the provisions of collective bargaining agreements take precedence over such local laws. Assuming the constitutional validity of these provisions, they should add much to clarify what has sometimes proven to be the difficult issue of alleged conflict between existing local labor relations laws and provisions contained in other laws.

This concludes my summary sketch of some procedural and administrative

ramifications of the proposed laws on public sector bargaining in our state. Please remember to take care that you not kill the umpire.

RECOGNITION AND REPRESENTATION: WHO BARGAINS FOR WHOM?

Harry Stark, Director
Institute of Management and Labor Relations
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The faculty of which I am a member is represented exclusively by the AAUP, and deals with the employer under a formal collective bargaining statute. It has done so for several years. Since I'm far enough away from that locality to be out of touch with the latest developments, I say with dubious certainty that they still hadn't successfully negotiated a wage package after the second year. Therefore, I'm not sure that the existence of a statute changes much, and I shall perhaps refer to this a bit later in my remarks.

The big question is, of course, who owns the store? There's such a thing as a public employer, and the law requires a public employer to bargain, but pinning down the public employer is very difficult indeed, especially if the appointing authority happens to be a public university. This is due mainly to the intense quarrel, which I learned exists on both sides of the continent, between universities and state governments about autonomy. We have here a very interesting political issue which serves as a backdrop for this entire discussion. I note that for you to keep in mind as you think about the discussions in which you will participate. The distribution of power among the various levels of the employing public agencies, an internal bargain over authority, lies behind much of our difficulty in achieving effective public sector bargaining.

The area to which I've been assigned, as Lloyd Ulman said, is "Who bargains for whom?" Perhaps a more descriptive or additionally descriptive

title would be "Establishing a Bargaining Relationship".

We often think that bargaining begins when the whole process is almost over, and the parties sit down at the negotiating table to record the results of a scenario that was written over the preceding several months or even years. Bargaining begins when a union representative says to an employer, "I represent a group of your workers, and I want you to deal through me." From that moment on they are dealing with one another. If they do it reasonably well, some ground rules will develop which will enable them to live with one another; if they do it crudely, they just may get started off on the wrong foot.

The parties do begin to negotiate with one another on such things as the ground rules for behavior during the organization and election process prior to the granting of recognition. I don't want to overdo that notion, but I do urge you to think of bargaining as a process with many aspects, and the parties don't always proceed happily hand-in-hand into the sunset. Some are successful, and some fail. It begins with a pre-bargaining negotiation over organization and representation, frequently which culminates in formal recognition; then proceeds to actually making a contract, while negotiating at a table face to face; and then culminates by living together under the agreement. That whole process can be thought of as bargaining.

The procedures for formalizing recognition in part depend upon the informal relationship which exists before the parties have already gotten to know one another. In fact, they may have even found it convenient to make some agreements on how they're going to conduct the organizing and election campaign.

I'd like to read a sentence which you might find in any statute that

purports to establish a framework for bargaining. The employer, you can say public employer if you wish, must negotiate exclusively with a representative organization chosen by the majority of employees in an appropriate unit.

There are five essential ingredients in that statement. There's an employer. The statute usually specifies that "The public employer must negotiate...". As happens in many jurisdictions, some public employers quite honestly feel that it's a violation of their trust to share decisions on a bilateral basis. They'll adopt policies unilaterally after discussion, but they won't enter into bargaining until they feel they're compelled to by law. The proposed statute clears that up.

"The employer must negotiate exclusively...". You can't negotiate with another collective representative for that same group of employees. They must negotiate exclusively with some representative organization -- union, association, whatever you want to call it -- chosen by a majority of the employees in something called an appropriate unit. It is the definition of that appropriate unit, and the method whereby the employees in that unit express their opinions with which the process of representation and recognition is concerned. The way in which that is done shapes the pattern of bargaining.

I don't know to whom to attribute this quote -- I attribute all quotes to John Dunlop -- but I think it may have been he who first identified the bargaining unit as "an election district." You can think of it as an election district, because it's an area from which people are going to be eligible to vote. The employees in the positions which make up that election district, the jobs or job classes, are the registered voters, and they're entitled to express their choice. As in all election districting,

the results vary depending on the boundaries you choose. If you think you're strong in a given area, that's the district you want to have the people vote from. You're not sure about the others. This is a very natural, understandable, and I suppose even defendable part of the political process.

The choice of an election district, that is, the definition of the appropriate unit, is quite critical. The unit is made up of human beings, people in jobs, and very often in the process of establishing a bargaining relationship, an employer representative and a union representative sit down and go over a payroll list, and say, "This one is in the unit, and this one is out." They'll bargain over some of those choices; there's a give and take. Again, they're negotiating. What are they bargaining about? Who can vote. Now, if they do this well, they make progress. It's a give and take, and sometimes it isn't very neat, and they'll have to clean up next year some of the mistakes made this year. Fortunately in many jurisdictions if they really can't agree, the umpire that Mr. Alleyne so well described to you is available. It's at the point where they can't agree that they go to an administrative tribunal. That basically, is a framework for you to think about as you get further into this process of bargaining.

Now we'll look at the three problem areas which the organizers of the program asked me to mention briefly: The recognition and certification process, criteria for unit determination, and exclusivity and organizational security.

As we review the Advisory Council proposals, keep in mind that employee organizations are still not legally recognized for bargaining purposes, and right now the struggle for recognition dominates our thinking. Consequently, rights and prerogatives are argued fiercely. Once the rights

are established, the procedures become critical. At a later stage, when the relationship is further evolved, then substantive matters take center stage and procedures seem less critical. We're not at that stage yet, so keep in mind that down the line, the parties will concentrate on issues of substance. Keep the procedure and unit questions in perspective. They are the means not the ends, although I readily understand that for an organizational entrepreneur, the employee association is a legitimate end in itself. Without that vehicle, they don't go anywhere.

This session deals with units, and a discussion of scope comes later. But, the two are obviously interrelated. Depending upon the group of employees, you'll find different interests in the matters bargained. Certificated teachers may be interested in the actual conduct of the educational process; people in other walks of life have different interests. Issues of total budgets and salary structures can be handled in comprehensive units; problems arising where people live and work may require a more intimate framework. The issue of bargaining units does interact with the scope question. Given certain assumptions about scope, you should choose units rather carefully.

Finally, let's recognize that the Council Report admits the possibility of legal work stoppages. Without arguing the merits, we can see that other aspects of the Report are affected by this; for example, which employees should be in a unit. We might well have different eligibility for supervisors if strikes were not contemplated.

So much for the preliminaries. Let's review the proposals briefly. The first notion with which I'm supposed to deal is recognition and representation. There are two ways of identifying a representative organization

and establishing a bargaining relationship. The employer can grant recognition without reference to the PERB, or either party may petition the PERB for determination of the appropriate unit and certification of the results of an election by the employees. The process starts with the employer, not with the Board. An employee organization files a request with an employer for recognition as the exclusive representative of employees in a unit defined to include a specific group of jobs. Proof of majority preference is given in such form as dues deduction authorizations, notarized membership lists or cards or petitions. The employer is required at once to post a notice on bulletin boards in the unit claimed. The employer is required to grant recognition unless there is already a lawful negotiated agreement or a valid bargaining agent has been determined within the previous year.

If an employer has a "good faith" doubt about the membership evidence, or the appropriateness of the unit, or has gotten requests from competing organizations, the employer can petition the PERB for a determination. If a union request is denied or not acted on by the employer within 30 days, the union can petition the Board. The Board dismisses petitions if there is already a lawful agreement in effect or a valid representative designated within a year. If the Board finds that a question exists about representation in an appropriate unit, a secret ballot election is held. An organization getting a majority of the votes cast is certified as the exclusive representative of employees in the unit.

Any group of employees, but no employer, can petition the Board for decertification of an organization claimed to be no longer representative of a majority in the unit. The Board will not hold a decertification election during the first year. Whatever the result, any election is a bar to

another election in any part of the unit for a year.

If recognition is granted by an employer without reference to the Board, the appropriate unit is whatever the parties agree upon. The Board only makes a determination if one or more employee organizations seeks an election. The appropriate unit is defined as "the largest reasonable unit" -- a very critical phrase -- of employees. Three major factors guide the Board in defining "the largest reasonable unit":

(1) the internal and occupational community of interest among the employees,

(2) the effect that the projected unit will have on collective bargaining relationships, and

(3) the effect of the proposed unit on the efficient operations of the agency and unit compatibility with agency responsibility to serve the public.

The Commission goes into some detail as to the components of these major determinants. Employee community of interest includes such elements as: the history of employee representation in the agency and similar employment; common skills, working conditions, duties, training, and common supervision.

Bargaining relationships are affected by geographical separation of employees, numerical size of unit, unit relationship to agency organizational patterns, effect on classification structure of dividing one class among units, and availability and authority of agency representatives to bargain effectively. This last factor is important because there must be a division of the unit so that someone has the authority to bargain. Bargaining is obviously adversely affected if the boss can refuse to discuss a subject

because it's "not within his discretion".

There are some other things you ought to be aware of because they're important in unit definition. Certain groups of employees are given special status. This recommended statute and the Report which supports it reflect a great deal of thinking, argument, and debate on the part of the Council members on this issue. I'm not suggesting that the Report's conclusion is the only answer -- others might have been equally recommended -- but it's the one they're advocating.

They deal particularly with three groups of employees; managerial and confidential employees, supervisory employees, and professional employees. Professional employees, they propose, should not normally be included in units with people who are not professional employees. That's a very well established principle. It's operative under the National Labor Relations Act, in which such employees get some choice as to whom they're going to be included with. That's very critical, especially for professional technicians and while not mentioned in this particular statute, craft and skilled trades employees. In this particular instance, the Council chose just to mention the professional employee. They defined professional in a particular way, with education and training for the profession identified with a program of higher education or its equivalent. The Report proposed that professionals have an option for a separate unit and normally not be included with non-professionals. It would pertain, for example, to certificated school teachers not being included against their wishes with other employees who were not "professionals." It could also apply to faculty members at a university, social workers, doctors and engineers.

The Commission decided not to list the professions. Many people think

of themselves as professional, have gone through serious training, and are licensed, but they don't happen to be doctors, lawyers, or ministers, so they're not conventionally accorded the title of professional. Nevertheless, they feel professional and they want the same rights. The Council hasn't precluded that; they apparently felt it better not to specify a list of professionals. The one qualification is higher education, some special course of training, or its equivalent. I think clearly they did not have in mind the skilled trades.

The Report also deals with managerial employees in a manner common in both public and private sectors. Management can't be required to negotiate with itself. If someone is truly a managerial executive or confidential employee -- in the sense of having access to information relating to employee relations, like the exempt payroll -- he doesn't belong in a unit. I think that's quite generally understood. There's a little confusion in my mind about the use of the term "managerial employee" in the Report and statute. I believe that it has to do with exercising substantial judgment and substantial authority. Somehow the term "managerial executive" seems clearer to me. Managerial employees may indeed contribute to policy formation, but I think it may needlessly exclude a lot of people who don't have any supervisory duties. As proposed, managerial employees and confidential employees are out. They have no bargaining rights under the statute.

Supervisory employees are given a little bit better treatment. They have rights, but they're not enforceable. This also follows the National Labor Relations Act, which doesn't forbid foremen from bargaining. It simply says that formen can't use the machinery of the law to force the employer to bargain with them. This is rationalized, I think sensibly, on the grounds

that you shouldn't make employers deal with their own agents unwillingly. So supervisors can bargain, if the employer is willing; it's the employer's option. They don't have access to the machinery or the umpire to get their day in court, according to this particular formulation. This is influenced by the fact that there's a strike possibility and management isn't allowed to strike. The employer is not forced to tolerate strikes by his own managerial agents. If you follow that reasoning, you leave supervisors out. We might take a contrary view and say that if the statute did not legitimatize strikes, we could arque for fuller rights for the supervisors.

One last item relating to units is the treatment of existing bargaining units. Existing bargaining units of non-supervisory employees cannot be challenged under the proposals so long as they were determined by an impartial agency. Units with supervisors are valid but subject to challenge using the proposed procedures. Units with existing agreements are free from challenge for the term of the agreement or for a maximum of three years.

The third item for discussion is exclusivity and organization security. The proposed statute requires an employer to bargain exclusively with the majority representative, which speaks for all employees in the unit, not just members. However, individuals may process their own grievances so long as the bargaining agent can be present and any settlement is consistent with the negotiated agreement.

Exclusive representation means that the organization represents everybody in the unit, whether they're members or not. If there are five hundred people in the unit, and only two hundred are dues-payers, that's not too comfortable for the organizational entrepreneur, and because of the possibility of raiding and challenges, it may not be too stable for the employer.

It can be a turbulent atmosphere, which can be reduced by negotiated forms of organization security. This statute envisions at least two forms: maintenance-of-membership and the agency shop. Maintenance-of-membership requires that once you join, you have to stay joined for a certain time. So that you can "unjoin", there's an escape clause. If I read it rightly, the escape period may not occur for up to three years, which seems a little long to me. An annual escape clause is common. At any rate, once you've joined of your own volition, you've got to stay in for a given period. The employer and the employee organization are allowed to negotiate an agreement, which requires the people in the unit to behave in that fashion.

Another form of organization security makes membership a condition of employment. You have to join the union within a certain time after beginning employment. This "union shop" is not proposed in the Report. However, if people don't have to join the organization but must pay a fee to the bargaining representative, we have what's called the agency shop. You don't have to be a member, but you've got to pay a service or a representation fee to your bargaining agent. That's a viable notion. It's been applied and used in numerous jurisdictions, including some in the public sector. This form of security is made possible under this statute. The employer and the employee organization can negotiate a provision that employees must conform or face discharge. You either have to join or pay the service charge. In this proposed statute, it's what the union or the association's normal fees, dues, and assessments would be. The Report provides that conscientious objectors may contribute to a charity instead, and employees may rescind the security provision by a majority vote.

These are the statutory proposals in essence. I'd like to make some

comments for discussion as requested by the program organizers. The Council was properly concerned to provide for institutional stability and security which in turn contributes to a more stable bargaining relationship. Their critical test, almost the universal criterion, in my view, is the effective functioning of the bargaining relationship to solve problems. Security as well as practicality, is enhanced through the principle of exclusive recognition. The proposals appear to cover the matter quite adequately and in a manner widely accepted. A multiplicity of agents for employees in the same unit has been rejected by public employers as well as employee organizations in many jurisdictions. The individual grievance option is also a reasonable and common practice. Minority organizations have no standing.

Having elections and agreements act as bars to challenges for fixed periods is also a useful contribution to organizational security. Collecting dues for the organization by the employer is also an important concession in favor of stability. Article 9 of the proposed law appears to make dues deduction a subject of bargaining and only available to the majority representative. It is a strong pro-bargaining feature and one which is constructive for the public employer.

Similarly, having maintenance-of-membership and the agency shop negotiable is a realistic contribution to bargaining. It provides additional issues normally within managerial discretion at a time when some public employees and appointing authorities have relatively little to negotiate with. Two minor points: A non-member service fee equal to dues, initiation fees and assessments may be inequitable. If people are free not to join and therefore do not have the vote and voice and benefits of members, perhaps the service fee should be less. Courts have held the agency shop legal, but

not necessarily at full membership costs. Also, three years may be too long a time for a maintenance of membership escape clause. A lot can happen in three years. It's curious that this substantive provision should be in the definitions rather than in Article 8.

The protection for pre-existing bargaining units is specific and fair, even more so for those permanently "red-circled" and free from challenge under the new procedure. Presumably those units would still have the advantages of the new statute, and not have to give up their immunity. The number of such units was not indicated in the Council report. This exception seems to counter the intent of the Council to guard against premature determination of bargaining rights. There is an understandable pressure to "lock-in" existing organizational structures, and there may be some question about a continuing exemption.

The representation procedures are in general consistent with the basic objective of developing constructive bargaining, but there does seem to be a slightly ambivalent aspect to the Report, reflecting a desire to make the system work by proscription and an apprehension that too much latitude may result in non-standard arrangements.

Voluntary recognition is contemplated, but the employer is required to advertise requests for recognition immediately. This seems calculated to invite competition and result in more petitions to the Board. All well and good, but why should the employer post notices at that stage when an election may not be necessary? One person's mature accommodation is another person's collusion. If mutually agreed units may contravene basic criteria, then all determinations should be validated by the Board after announcing an intent to do so.

The Board is authorized to set standards for proving membership pre-

ference to employers. This could protect against possible leadership abuse in manipulating choice of agency or unit. Section 3508(c) empowers the Board "to determine in disputed cases, or otherwise to approve, appropriate bargaining units." It is not clear whether this means Board approval is required for units mutually agreed by the parties without elections. A representative agent can petition the Board if the employer doesn't respond in thirty days, but a "reasonable period of time" is to be set by the Board to allow for competing claims before an employer can voluntarily grant recognition. Intervention seems to be wanted. The guidelines might be better protected by requiring Board elections for all exclusive recognition or at least prior announcement by the Board.

The statute gives the Board general rulemaking power and repeats specific rulemaking authority for each major function. At the same time, the statute provides specific time and procedural requirements which seem to contradict the Report's intent to have a strong Board with wide latitude.

In some places the statute wording seems confusing. Apparently, an agreement in effect for more than three years is not a ban to challenging recognition request [3580.5(b)(c)] or to a decertification petition [3521.5(b)]. In that connection, "any group of employees" can file a decertification petition, and although it is not indicated that it means any group in or related to the unit, that is likely the intent.

Either the employer or the employee organization can petition the Board for a unit and representation determination under Section 3521, but under Section 3523 "the Board shall not direct an election in a unit unless one or more of the employee organizations involved in the proceeding is seeking or agrees to an election in such a unit." Apparently, the intent

is not to allow an election on the employer's request alone.

These are relatively minor matters and the ambiguity may be more in my reading than the statute, but the proposed law does have some awkward passages, with employer obligations subsumed under employee rights and organizations.

On the whole, the report and recommended statute are comprehensive, consistent and fully responsive to the need for a public labor relations policy. The basic issues were confronted with thoroughness and the positions taken are stated in the Report which is incorporated by reference into the law. Perhaps for that reason there is no preamble in the law, but rather a brief statement of policy recognizing the right of public employees to bargain collectively through representatives of their own choosing.

It is difficult to fault the basic purpose underlying the Report: "to promote sound employee-management relationships in the long run" (p. 87). The commitment is to the institution of bargaining and to making the system work. It is possible, of course, to accept that goal and yet advocate alternate methods for reaching it. So far as the central issue of unit determination is concerned, the Report speaks loud and clear "too many is worse than too few." (p. 84). This is not simply for the convenience of big employers and large, well-established organizations. It flows from the experience in the public sector to date indicating that a proliferation of units is inimical to the effective functioning of the bargaining mechanism.

Consequently, the three major criteria for unit determination are to be considered in implementation of that overriding principle: the largest reasonable unit is appropriate. If the unit being petitioned for is not such, presumably no election would be ordered by the Board. It is not clear that the Board must prescribe a unit if the one sought is inappropriate.

The community of interest sub-criteria are specific and varied enough to give the Board wide latitude as intended by the Council. The agency efficiency criterion is useful and should allow for departures from the "largest" principle to cover such conventional practices as separate units for plant guards or institutional security officers.

The exclusion of management from all rights under the law is also common, but the phrase "managerial employee" may cause some difficulty with professionals who do contribute significantly to policy formation and implementation (education, health care, etc.) but are not primarily supervisors. The term "managerial executive" might be more apt. Self governing professionals might be excluded completely if the provision is strictly integrated.

Supervisors may bargain but have no recourse to the law. This is consistent with the NLRA and with the notion that management shouldn't strike against itself. But without arguing the strike issue which is covered in another session, the supervisory exclusion may not be fully appropriate in public employment. In my own view, they should have the same rights as others although normally not be in a unit with their subordinates.

Principals and school administrators below the superintendent level are caught between the classroom teachers and the school boards. The lower management levels in the classified civil service are not policy making executives in the usual sense and for years have provided leadership in associations. Perhaps the Council's intended criterion of "substantial responsibility" might have such people declared functionally not to be supervisors and therefore eligible, as department chairmen in some universities. If not, then the proposed bargaining concept may be too narrow

and not imaginative enough to provide an alternative in the public service.

We might stretch our concepts to get around the unfortunate tendency to separate everyone into two camps. There is a middle ground. There are those who perform some managerial functions and yet are not management. Not only building and printing trades give examples of foremen in the union, line leaders and head workers are more common than may be realized. They function, often effectively, because they combine union leadership with elements of supervision. We won't stretch the analogy of the non-commissioned officer too far, but it would be a loss if some experimentation is not tried in the public sector.

The key word is "authority" rather than "responsibility". If the supervisory employees have substantial authority on their own, then exclude them. And let's use the distinction between initiating decisions which non-managerial workers can do, and the approval and enforcement of decisions which is reserved to higher management. Leave room for some innovation with professional and supervisory staff in the public sector. I think that in this regard, the Report appears protective and over-anxious to have things neat. It's too traditional.

Also, I'm not completely comfortable with the special case of the professionals who can be in separate units. They may be few enough and distinct enough to enjoy special status without too much damage to the "largest" unit criterion. The Report is consistent, with this exception, and the crafts are not given similar opportunity. But whom are we trying to benefit? Not employers or organizations, but rather employees who have the choice. The Report here minimizes NLRB precedent and rejects the craft option, but then urges NLRB precedent in excluding supervisors. True,

crafts might be accommodated with the "bargaining history" criteria. Professional separation is justified "because of the history of people in the same profession tending to band together." (p. 93). So do technicians and para-professionals and highly skilled specialists who may not have a history of bargaining, as well as the skilled trades who do have such a history.

The Report stresses big units, so that bargaining can work. For whom? To work for employees, it has to work where they are, at the site -- school, clinic, laboratory, garage. Such units allow employees to have an effect and allow management to have a response. The critical factor underneath the sound relationship criterion is the "availability and authority of agency representatives to engage in genuine collective bargaining." (p.88). Public policy makers must arrange the distribution of authority so that lower level management can respond. The large unit criterion may militate against devolution of power unless there is some modification of principle.

It is difficult for employee organizations to perceive that units must coincide with the authority structure of management so they can respond or take initiative. Similarly, it is hard for management to see that units should enable bargaining to function, not to maximize employer prerogative. Bargaining "works" when it identifies and resolves problems, not when employees are frustrated by management's inability to respond.

As usual, money is the villain. We are all so bemused by money and budgets that the other elements in bargaining may be submerged. You and I share a common desire for higher salaries to raise our living standards. But where we live and work, we are very much concerned about job security, performance evaluation, workload, protection against arbitrary action, and a voice in making decisions. Those are very real concerns often convertible

into money equivalents. Transfer to a better paying job or a merit increase is possible even if we can't alter the salary scale.

Big units encourage political bargaining since we are practical enough to know that the money package is set at the top. Lobbying is a time honored and effective technique, but it is not the bargaining which the Advisory Council wants to encourage. I have stated the case in sharp terms to make the point. A balance between central control and dispersed power is admittedly painful to maintain. We shouldn't be too afraid to try for more autonomy. Politics and the prevailing wage pattern are likely to dominate the financial settlements in any event. Market forces from the private sector set a strong pattern for the public sector.

I am not necessarily advocating a two-tier system as an alternative. Association bargaining may well provide some middle ground. I'd almost be willing to let the salary structure be set by an alternative technique if I could really bargain my place in that structure at the local level. This may be more persuasive for employees in large state-wide systems, but is also valid for larger municipalities, counties and school systems.

A final point on an unmentioned criterion. Page 89 of the Report states, "although not directly represented in unit-determination proceedings, the public's interest must be protected by the Board." There's the hidden preamble. We want bargaining to work and to implement employee participation because that method of settling disputes is in the public interest. To borrow a sentence from another pending piece of legislation, "the Legislature finds and declares that employer-employee participation, with regard to the formulation of matters falling within the scope of wages, hours, and other terms and conditions of employment, is in the best interests of all California citizens." (3500 SB 32)

THE SCOPE OF BARGAINING: WHAT TOPICS ARE NEGOTIABLE?

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I would like to set forth briefly the context of my remarks; what I regard as the themes and strains surrounding collective bargaining in the public sector; why it is that matters of interests are turned into issues and issues turned into disputes. What I shall be trying to get at is the reason why an audience such as this, composed entirely of intelligent, compassionate, and public spirited citizens, should find themselves so divided on the several recommendations contained in the Council's Report, not the least controversial of which is the section dealing with the scope of bargaining -- the subject matter that is appropriate to discuss at the bargaining table.

The basic reason for this division of opinion can, I think, be found in the different expectations we have of our public institutions. To be sure, we want them to be all things to all people, but when push comes to shove, we expect them to respond in a manner congenial to our special interests and concerns. Depending upon who we are, and what we do, we want our institutions to provide some things more than others.

Now what are these expectations? I discern three, all of which have been with us since the founding of the republic, but in recent years seem to have taken new meanings, even, one might say, a sense of urgency. The first is the growing concern that public institutions be placed under more direct control of those on whom public benefits are conferred. Perhaps the most dramatic evidence of this can be found in:

(a) Decentralization and Public Education Control

(b) Public Review Boards

(c) Welfare Rights Organizations

The second is a growing interest in seeing to it that our public enterprises are run more efficiently. The word "productivity" has crowded out the "right to strike" as the chief topic of conversation when good fellows sit down to talk about labor relations in the public sector these days. At least that has been the case in our neck of the woods. There is the view held by several of our citizens, unverified of course, that never have so many done so little for so much. It is rather striking in this regard that in a recent Harris poll a cross-section of American citizens, when asked to rank the productivity of individuals engaged in different lines of work, put government employees at the very bottom in terms of productivity effort. Thus, the emphasis on P.P.B.S. and Educational Production Function Studies, and other attempts to apply cost-benefit analytical techniques to the conduct of public business.

The third expectation, and one that seems to be growing at a very rapid tempo of late, is our concern that public institutions ought to distribute their costs and benefits fairly. It is hardly necessary, speaking in a state that spawned Serrano v. Priest, to elaborate on this theme. I would only point out that it is our renewed concern about fairness or equal treatment that causes us to take a second look at the way in which we assess tax burdens, and the manner in which we propose to provide equality of opportunity. It is also a part of the "fairness revolution," and the motive force for our being here today, that public servants be treated in an equitable manner. I am mindful of the fact that the official title of the statute governing the employment arrangement

of public employees in New York State is the Public Employee's Fair Employment Act. Thus, without suggesting that public employees have not been treated fairly all along, our legislature has said that collective bargaining is the essential mechanism for achieving fair treatment. I take it on face value that, unless our (and other) legislatures employ adept phrase mongers to come up with nice sounding, though meaningless phrases, the legislature meant what it said.

Now I don't believe that I could get an argument out of anyone here that the principles of public control, efficiency, and fair treatment are not laudable social goals. Nor do I believe that such goals must always be mutually exclusive. When we look at particular issues, however -- virtually any issue raised in the Council's Report -- I think we will find ourselves defending or opposing these issues on the basis of our attachment to one or more of these goals. Sometimes the attachment will be a consequence of a philosophical or ideological commitment, but more often, I suspect, it will be a result of the role we play, more specifically, whether we represent employers or employees.

The question of what ought to constitute the appropriate subject matter of negotiations is illustrative of the point I am trying to make. Those who advocate a narrow scope often argue that political democracy and public control is threatened by the encroachment of industrial democracy, inherent in a no-holds-barred approach to collective bargaining. For those believing in a broad, virtually unlimited scope of bargaining, the view is that limitation placed on subject matter would be unfair. The parties, according to this position, ought to be obliged to bargain over all conditions of employment, broadly construed. The principles of fairness dictate that neither side

should have the right to determine what those conditions are. Nor is the concept of fairness always compatible with what the employer might regard as the most efficient allocation of scarce resources. Robbed of its fancy terminology and its grandiose assumption, the purpose of bargaining is to get the boss to change his mind. There is less concern, it seems, about the boss being influenced on matters generally accepted as working conditions (wages, hours, fringe benefits, a grievance procedure) since he would be making adjustments in these areas anyway. Indeed, it is at least debatable in light of the current inflationary spiral whether bargaining has brought about any substantial changes in wages, hours, and fringes since it is impossible to know which portion of upward adjustments ought to be attributed to bargaining and which to other factors.

What concerns many of our citizens is the degree to which public policy (the nature, quality, and quantity of the public benefits that ought to be conferred) should be influenced by the bargaining process. True, group pressure is a recognized part of our political life, but we also believe that there ought to be limits on that pressure. The worry, then, is that when there is a virtually unlimited scope of negotiations, and employee organizations, through strike action (or threats of strike action) can force concessions on public policy issues our systems of policy formulation and public benefit conferral may become seriously and irreversibly altered. There is also the concern that, while it is wise policy for public management to consult with its employees on proposed policy changes, there are some policy issues which ought not be formulated in the cooker-pressure, adversary ridden atmosphere of the bargaining table. Such matters as curriculum reform, improved services to welfare recipients, better deployment of police, fire,

and sanitation workers come to mind as examples of items that many believe ought not be made mandatory subjects of bargaining. I speak with experience on one knotty issue: Student Discipline. Certainly a condition of work, employee organization demands range from psychological counseling, to the right of teachers to suspend unruly students, to something approaching euthanasia. Obviously, this issue also involves other parties besides the teachers -- students, parents, and the civil liberties union, for example.

The Council's Report deals with these issues in a tangential way. A reader comes away with the view that the issues were carefully considered then rejected, possibly because they are frivolous, but more than likely because they are so blatantly wrong-headed that they do not warrant serious discussion. The Council could be right on both counts.

I will not attempt to summarize the chapter on the Scope of Bargaining. I assume you have all done your homework, but let me refresh your memory. The Report discusses two general souces of constraints on the scope of bargaining: a statutory management rights provision, and competing legislation. In a handful of jurisdictions the legislature has restricted the scope of bargaining by either specifying the subjects to be bargained over /see recent bill in N.Y. Legislature/ or by including a management rights provision, in which management rights are spelled out in unmistakable fashion. The Council rejects the concept of a statutorily imposed management rights provision, or any statutorily imposed limits. It does so largely on the grounds that such provisions "preclude the parties to a bilateral relationship from agreeing upon the scope of bargaining. In this sense, they convert the reserved management rights doctrine from a flexible principle into a rigid dogma."

What is proposed instead is that the administrative agency, such as the NLRB in the private sector, or the administrative boards in other states, would rule on the appropriateness of a given topic, consistent with the pre-emptive language contained in the statute. The agency would be triggered into action when one of the parties brought a refusal-to-bargain charge against the other.

I agree with this approach. Recent history indicates that in those jurisdictions that do have statutory management rights provisions there is much confusion, and public management gets very little of the protection it thought it was going to get. I would remind you that New York City has a strong management rights provision in its collective bargaining law which has not kept the scope of bargaining within limits, nor protected the management function. There is a need to keep contracts uncluttered and a need to strengthen management authority in many areas, but I do not believe that in either case these goals can be achieved through statutory management rights provisions.

The restraints imposed by alternative systems is a more difficult problem and less easily disposed of. The Council sees two broad areas of restraint: prevailing rates restraints and conflicts with other legislation such as civil service. With prevailing rate ordinances and other comparability measures one can expect unions to argue that wages be excluded from coverage. Thus the anomaly of a union pressing for a restricted scope and the employer arguing for a broader one. The Council recommends, and the proposed statute so states, that the collective agreement, if ratified by the appropriate legislative body, shall supersede such prevailing wage ordinances. I believe that this is proper. Bargaining is a two-way street; unions ought not be allowed to stand behind the protection afforded by competing legislation on some matters while seeking

concessions from management in others. Unless the possibility of loss is built into the process, we will not have collective bargaining as we have come to know and love it.

I also agree in the main with the Council's recommendation that the provisions of the collective bargaining agreement ought to supersede most provisions of the civil service system, although I do not always find it easy to reconcile the views expressed in the body of the Report with the proposed statutory language. Here is what the proposed statute says:

> Provisions of agreements between employers and employee organizations on matters within the scope of bargaining that are adopted by the legislative body of the employer, shall, in the event of conflict, prevail over state or local statutes or charter provisions, ordinances, resolutions, or regulations of an employer or its agent, including a civil service commission or a personnel board.

It is based on the recently amended Connecticut Statute covering municipal and public school employees.

I trust that you will not think I am nit-picking (though well I might be) when I pose the question as to whether the Council has succeeded in its objective when it adopted this language. There are a number of areas that are unclear to me. To illustrate, does the Council propose that when a California municipal employer adopts a collective bargaining agreement the provisions of that agreement supersede a general state statute? My interpretation of Section 7-474 (b) of the Connecticut Statute is that, with two exceptions, the term of a municipal agreement does not prevail over state statutes.

Is it the intent of 13 (b) that if the parties in a school district, for example, were to negotiate a discharge notice period for tenured teachers which affords a lesser time than provided in the Education Code, that that contractual

provision should prevail over the state Education Code? My guess, based upon a reading of the discussion preceding the proposed legislation, is that the drafters of the bill did not so intend.

Certainly there is good reason to have certain provisions of state law -- Education and Civil Service -- superseded by the collective bargaining agreement. As things now stand in most jurisdictions education and civil service laws serve as the floor from which employee organizations negotiate. Thus, to use the example of due notice mentioned earlier, it does not quite satisfy my idea of fairness that a teacher organization is free to negotiate upward from a 30 day notification period while the employer is not free to negotiate downward. I see no reason, if indeed the agreement does supersede the Code, why the employer may not bargain to have the 30 day period reduced to 15 days, or to five minutes for that matter.

I am also puzzled, given the Council's clear intent to expand the scope of permissive bargaining, by the absence of clear legislative language permitting the parties to negotiate job protection provisions substantially equivalent to state statutory requirements. I use job security as an example because it is certainly the most burning issue facing the parties in New York State at the moment. An inference I draw from the discussion in the body of the Report is that the parties, in cases other than those at the state level, ought not be allowed to negotiate just cause dismissal clauses for tenured employees if state statutory provisions set forth mandated procedures. If the Council intended to authorize such provisions, and one cannot help but believe they did, that intent ought to have been made explicit, particularly since the Commission has sought to avoid litigation in the drafting of other provisions.

A third aspect of the proposed legislation is the failure to include a section similar to 7-474 (g) of the Connecticut statute which prevents the parties from agreeing to provisions superseding basic civil service principles. The discussion in the Report led me to believe that the Council favored the exclusion of certain merit related items from consideration at the bargaining table.

I mention these puzzlements, not because I believe the Council's recommendation is mischievous (it has great merit), but because the problems it engenders may be more vexing than they appear at first blush. The Council does not regard very highly the procedure we use in New York, that is to say, no modification of potential conflicting alternative systems. The Council seems to believe that the reliance on litigation, which is the method by which scope issues are eventually resolved in New York, is not the best way to secure acceptability by the parties. That may be the case, but in the three and one-half years since we've had an unfair labor practice provision in the Taylor Law, our Board has had to issue decisions on only 23 improper practice cases, only a small proportion of which had to do with refusal-to-bargain charges. There is still a great deal of confusion in New York stemming from the conflict between what is deemed to be appropriate bargaining subject matter and competing legislation. We tend to believe that over time, through litigation and a minimum amount of legislative tinkering, that confusion will be lessened. We also have, in the recent Huntington decision the ruling that all issues may be negotiated unless applicable statutory provisions explicitly and definitely prohibit the employer from doing so. This does not deal with the distinction between mandatory and permissive issues, but that is not among the most critical

issues in the field, in my judgment. In short, our view is that the ailment is not so severe that the type of drastic surgery contemplated by the Council is really warranted.

It is also at least conceivable that we worry too much about legislative regulation of the scope of bargaining. There are, after all, some rather potent restrictions imposed by the collective bargaining process itself.

(1) As the Council makes clear, while there may be a duty to bargain on several issues, there is no duty placed on either party to make a concession.

(2) Subject matter based on ideological differences will decline.

(3) Since the right to strike is granted, and the exercise of that right is costly to employees, one can predict that very few, if any, abstract and complicated policy issues will be pressed to impasse. Employees are not ordinarily willing to suffer loss of pay in the pursuit of vague principles. The burden of the strike can be an excellent vehicle for bringing bargaining subject matter within manageable limits.

I return to my original theme -- we do have important differences in what we expect of our public institutions. Of the three expectations I mentioned earlier -- public control, efficiency, fairness -- our emphasis today is on the latter. The expansion of the scope of bargaining is in the interest of fairness. Such a move also carries with it the potential of doing mischief to our other expectations, but I believe the potential can and will be blunted once the parties learn that collective bargaining was not designed as a mechanism for resolving social problems. It has a more limited, though very important role.

DISPUTE RESOLUTION: HOW ARE CONFLICTS RESOLVED?

David Ziskind, Arbitrator and Attorney

Addicted as I am to last minute preparation, I got on the plane this morning and immediately proceeded to organize my thoughts and outline my speech. The man next to me said, "Good morning". I mumbled, "mm, Good morning", and continued to write. I worked along and soon he asked, "Are you a salesman?" It seemed simple to answer "yes" without lifting my pen from my notes. After awhile, he said, "What do you sell?" I thought I'd dismiss him with an uncommon reply and said, "Wit and wisdom". That floored him for awhile. I continued to work, but as the plane landed here in San Francisco, he turned to me and said, "You're the first traveling salesman I've ever met who didn't display any of his samples."

Now that I look at my notes, I'm afraid I don't really have any samples. Sitting on the dais under these intense lights, I feel more wilted than witted; but I'll try my best to give you an evaluation of that portion of the Advisory Council's Report that was assigned to me for comment.

I would like first to make a few remarks on how I think we in this conference ought to approach the subject. As I look around I see a number of you whom I have known to be involved in employer-employee relations for years. I wonder if we are to have a talk-fest or an open confessional. Whatever the potential, it seems desirable that we try to lay down a few guidelines.

The Advisory Council formulated a very definite philosophy of labor relations, a philosophy based on collective bargaining and voluntarism. If you accept that philosophy you will have one set of comments to make. If you

disown that philosophy, you will have entirely different comments. I would like to suggest that in the discussion at this seminar we ask ourselves, Do we accept the notion that collective bargaining is an essential function of our economic order and of government employment?; or do we cling to the notion that the State is a sovereign, which must not bend or bow to any other influence? Do we believe there is a public good to be served by governmental agencies and that the employment policies of those agencies are of concern not alone to the labor-management participants, but also to the consumer public? Do we regard any one of those interests as paramount?

I think it is important that if you have a firm commitment along any of those lines, you indicate first what your commitment is, in order to determine whether or not you are in agreement with the commitments expressed by the Advisory Council. It makes little sense to talk about any detail of the Report as good or bad until you accept or reject the basic premises of the Advisory Council. That is not to say the Advisory Council is necessarily or presumptively correct, but you cannot properly criticize or evaluate any of its proposals unless you first make clear whether or not you are proceeding from common values, or whether you have values that are so disparate that there can be no worth to you in any of the Council's proposals. I think that this is particularly true with respect to the area that I'm supposed to cover - the proposals for dispute settlement and the validity of a strike. Those matters are so controversial that unless we can agree upon certain basic premises, we have little basis for meaningful discussion.

From time to time various ideas become popular in the so-called public mind. Professor Doherty says that now people are concerned with productivity, with local controls and with fairness. I don't know how universal those

concerns are, but we as discussants must state for ourselves what our primary concerns are. If our primary concern is productivity, government decentralization, the protection of the consumer, the protection of the worker or the protection of management, let's lay that on the table. Only then can we have an intelligent discussion over the merits of the Council's proposals.

Each of us has a private, personal interest. Each of us has been associated in some way with management, labor, or the so-called neutral. Those are personal interests, and if we look at the proposed legislation primarily from the standpoint of our own personal and private interests, we will narrow the common ground for argument or consensus. Our personal interests are valid, and we ought to bring to the discussion whatever problems our personal interests present, but I believe our objective should be something broader than those personal interests.

What do we intend to accomplish with this piece of legislation or with any public employment scheme? Do we want just more productivity? Do we want only to accomplish peace? Do we merely want contentment and self-aggrandizement? Generally, I find we want to accomplish something which for want of a better term, I might call "industrial justice", the optimum satisfaction of the needs of all concerned with public employment, the satisfaction of the needs of the worker, the needs of the manager and the needs of the consumer. Let us not gloss over specific difficulties by talking generally about the public interest. We must talk about specific needs. We must seek to determine whether or not the Council's proposals will satisfy most of the needs of the public agency, the public employee, and the public. We should accept or reject its proposals on the basis of how well they meet those needs.

Now let me get to the specifics of the Council's proposals.

The Advisory Council deals with impasse resolution in two areas: rights impasses and interests impasses. The rights impasses are those crises that grow out of disagreement over the meaning of terms in existing contracts. They involve rights because they are based on contractual obligations. Disputes over the interpretation of binding contracts are contracts over rights. The interest impasses are crises which arise out of differences concerning terms to be inserted into new agreements. They are disputes over proposals which are of interest to both sides but which have not been crystallized into contractual obligations. Rights impasses may be resolved by reference to the contract out of which they arise. Interest impasses may be as broad as imagination, with few benchmarks for resolution. Accordingly they call for different treatment.

In the area of impasses of right, the Council recommends that we have a voluntary system; stressing collective bargaining, and allowing the parties to decide whether or not to submit impasses to arbitration. The Council relies on the fact that in private industry, in approximately 95% of the collective bargaining agreements, that technique of impasse resolution - voluntary arbitration - has been accepted and has proved satisfactory. They see no reason why it should not prove acceptable and satisfactory in the public sector. The common alternatives are to strike or to go to court. Either of those techniques is more costly, more dilatory, and much less likely to result in expert disposition than the arbitration process. The Council has decided not to recommend compulsory arbitration in those situations - I think largely because they rely upon the experience in industry generally and recognize that with legislative encouragement, most agencies and most unions would accept arbitration voluntarily. The

Council has a basic philosophical commitment to voluntarism, that is, to the perpetuation of voluntary arrangements insofar as possible. Rights impasses lend themselves rather easily to such treatment.

In the area of interest disputes, the Council has a five-finger plan. The first finger is critical collective bargaining; the second finger is mediation; the third is fact-finding with recommendations; the fourth is secret balloting, and the fifth is court action. Each of these techniques is well-known in industry.

The Advisory Council adopted these techniques in an eclectic approach. Council members took what they regarded as the best devices that they could find in society and integrated them into an orderly system. Their originality was that they combined time honored techniques in a way which is unique.

I'm going to attempt to discuss these various techniques indicating how they tend to satisfy the basis needs of everybody involved in public employment and indicating, in some instances, possible variations or possible novel approaches. I take the position that this is a wise piece of proposed legislation because it takes advantage of the experience of people in industry and the experience of people in government over a great many years.

The Chairman has referred to a book on Government Strikes which I wrote in 1941 and which was reprinted in 1971. The facts I recorded as well as the conclusions I reached and the evaluations I set forth in that book have validity today. I believe it is a sound approach to the problems of public employment to ask, "What has been our experience in government employment and in private industry, and how can we best utilize that in the resolution of impasses?"

Let's consider the Council's five-finger proposals one at a time.

The first one is critical collective bargaining. I hasten over the crucial question of whether there should be collective bargaining in public employment. I will not cavil over the nuances of "meet and confer", "collective conferencing" and similar differentations. If you are unwilling to accept the premise that collective bargaining is the most effective, the most democratic, the most satisfying method of settling terms of employment in the public sector, you are disowning the Council's scheme to resolve impasses at hand, and have no real interest in its specific proposals. I believe also that those of you who may be unwilling to accept collective bargaining in public employment are waging a rear-guard battle with historic trends. Time and the inexorable demands of public employees will bring you around. I accept the Council's premise that collective bargaining satisfies most of the needs of partisans; hence I shall go forward with my evaluation of its proposals on that basis.

Even after the parties reach a point at which they say, "Further conversation, further argument, is relatively futile; we have arrived at irreconciliable positions", the Council says they must continue the idea and the effort of bargaining. Everything else that is done, whether it is mediation, fact-finding or court action, is directed toward the enhancement of bargaining and the resolution of disputes that will bring about as much as possible the intent of the parties themselves. There are no simple processes for this. The Advisory Council has provided for a special period of renewed bargaining, a period of ten days after the rejection of the fact-finders recommendations. But throughout all of the techniques there is the notion that bargaining is the end sought and the agreement should be as close to voluntary as possible. It has been said that the essence of bargaining is

"I'll pay attention to your unreasonable demands, if you pay attention to my unacceptable offers." That is still the situation when parties reach an impasse, and it must be a continuing process thereafter.

Some people have recommended that this is so important that one ought to have continuous bargaining, in between collective bargaining contracts; that there ought to be periodic meetings between management and labor to discuss issues before they become strike issues. There is much to be said for that. It has not been incorporated into the Council's recommendations; and I don't recommend that it be incorporated because I think that it is something people will have to learn about and grow into in time. It will fit certain situations and not others. But basic to any resolution of disputes, I think, must be the notion that the unacceptable demands and the impossible offers must be considered as part of the ultimate resolution.

The second technique is that of mediation. Mediation is an old method that you have all probably experienced. The mediator usually goes into a room and learns that management's position is "Whatever they ask for the answer is no"; and labor's position is "We're not quite sure of what we want, but we're not going home until we get it". The mediator must pull the dissidents together to a point where they reach mutual understanding. It's a very useful and a highly successful technique in that it resolves the majority of impasses submitted.

In government employment I think there are some special possibilities because in government there are usually some very influential people available. It was my good fortune during the war to be involved in mediation techniques in Washington, D.C. In very critical disputes or strikes, we'd bring the recalcitrants to Washington where generals and admirals, (no one of a lower

rank) spoke to them. We used "official brass" designedly. In a few major disputes cabinet members pleaded for peace. In the most critical, and reserved for only the most critical, the President spoke to these people.

There are always available some people of special influence in Government. That is a very propitious psychological factor. David Cole tells the story of an impending coal strike in which he brought President Truman and John L. Lewis together. They had dinner at the White House; talked about the strike, and the President got nowhere. Before saying good night, he took John L. Lewis around the White House and showed him various historic bits of furniture. They came to one desk and he said, "Mr. Lewis, this is the desk at which President Lincoln signed the Emancipation Proclamation". Lewis paused, ran his fingers over the desk, smiled and said to the President, "You've touched me. Tomorrow morning the strikers will go back to work". These emotional factors obviously can be brought to play in government employment much more than in private employment.

The process of mediation is not always a process of getting sweet reasonableness. It is just a process of bringing people together. As a matter of fact, the more I see of industrial relations, the more I wonder if reasonableness is really an essential test or criterion of what makes good sense. I'm reminded of a statement that George Bernard Shaw wrote: "The reasonable man adapts himself to the world. The unreasonable man persists in trying to adapt the world to himself. Therefore, all progress depends on the unreasonable man." The mediator knows how to adapt people to each other. Whether they are reasonable or emotional or arbitrary, he succeeds in bringing them together in most instances.

The Advisory Council says where mediation fails the parties should go to fact-finding with recommendations. As proposed, fact-finding with recommendations is essentially a form of advisory arbitration. The fact-finders are third parties, and it is optional with the two principals whether to accept their recommendations.

The proposed statute provides certain standards that the fact-finders must follow in reaching their recommendations. Those guides include almost everything. The first six of them are: the lawful authority of the employers; any stipulation of the parties; the interests and welfare of the public and its ability to pay; a comparison of wages and hours in comparable communities and in private industry; the cost of living; and overall compensation including fringe benefits. Then there is added a seventh item, "such other factors not confined to the foregoing which are normally or traditionally taken into consideration." In other words, the fact-finders are told what they are supposed to consider, and then told to consider everything that makes sense, and to come up with their best recommendations.

Fact-finding has been used rather sparingly in American industry. It was originally used when parties had no other recourse, and they thought a few prominent individuals might influence public opinion in their behalf. As the Council points out, however, public opinion changes have not resulted from most fact-finding. In the Council's scheme, it is expected to arrive at a determination of what will satisfy the needs of all persons interested in public employment. Such findings and recommendations may have great weight. Nevertheless, the fact-finders are expected to wield their power in a manner consistent with voluntarism in a set of recommendations that will appeal to the bargaining parties.

The next step is to have secret balloting on whether or not the fact-finders' recommendations will be accepted. The secret ballot is to be submitted to both management and labor. The issue to be voted on is whether the recommendations of the fact-finders should be accepted or rejected.

We've had some experience with secret ballots in labor disputes, in this country and elsewhere in the world, and generally we have found that the balloting has not helped. The National Labor Relations Act was amended to eliminate the need for balloting on union security clauses because the workers voted one way in over 90% of the cases. Recently the British Industrial Relations Act incorporated a voting provision into its law, and in their first two major strikes the issue submitted to the workers was whether or not they wanted the strike or would accept their employer's last offer. Overwhelmingly they voted to strike. What is the good of that kind of a secret ballot? I think it can be argued that it will accomplish very little except to stave off a strike while the parties jump one more hurdle or take one more opportunity to reach a peaceful settlement.

The fact-finders' recommendations are to be kept secret for a ten day period of further collective bargaining. If the bargaining is still not successful, then there is to be a secret ballot on the recommendations. I regard that as probably the weakest of the proposed measures to resolve impasses, but it has been used with some success in other instances.

If there is no acceptance of the fact-finders' recommendations, either side may decide to resort to economic action, a strike or a lock-out. The side taking that position must give five days notice to the other side, and during those five days any participant or any member of the public who claims an interest in the dispute may go to court and seek an injunction

to preserve the public health or safety. The court is to grant the injunction only after a hearing and only after a finding that it is necessary in the interests of public health and safety. If the court does not make such a finding after a hearing, the strike or the lock-out will be permitted.

We've had considerable experience with court actions. Generally I think we've reached the conclusion that courts are not effective tribunals for the resolution of industrial disputes. The predilections and the social biases of judges are usually not attuned to the needs of employers and employees. We have experienced a great abuse of the judicial process -- particularly in the area of injunctions. The recommendations of the Council attempt to overcome both of those objections to court proceedings.

The first objection is the competence of courts to understand the needs of employment. In the Council's Report the courts are limited to accepting and ordering acceptance of the fact-finders recommendations. The courts may not substitute their own determinations of what is good for public employment. Secondly, in the injunction process the courts are required to hold hearings. Temporary restraining orders are granted in private industry disputes without hearings -- on affidavits that are commonly stereotyped and of little probative value. The hearings required by the Council would give parties an opportunity to present both sides of a story and to present evidence so that the judge might better ascertain what the real facts are. Most importantly, the Council would require the judge to pass upon or make a finding on only one question - What is necessary for public health and safety?

In the Labor-Management Relations Act the possibility of an injunction

is restricted to cases found to involve a national emergency. We've had relatively few such cases in court and we have found it extremely difficult to define what is a national emergency. There is serious question as to whether or not we can agree as to what constitutes public health and safety, but I think that standard or that test is much more specific than the notion of national emergency, and it may be possible to arrive at a reasonable determination of what is jeopardizing public health and safety in specific cases. I say that particularly because in public employment we have had the experience that strikers in critical occupations have recognized the needs of public health and safety and have provided emergency standby services. Striking policemen and firemen have on occasion provided skeleton crews to take care of emergencies. In both public and private hospital disputes, striking workers have often agreed to provide staffs that would carry on services of critical need. It would be possible for unions seeking to strike to offer to provide services that would take care of imminent matters of health and safety and thus assure the preservation of public health and safety. I think that the Advisory Council in circumscribing this technique of court action -- in limiting the scope of a judgment, in requiring a hearing for an injunction and in setting the criterion of public health and safety -- has met many of the objections to court action in industrial disputes.

These are the five fingers to handle interest disputes -- critical collective bargaining, mediation, fact-finding with recommendations, secret ballots and court action. What can they mean to public employers and employees? Much depends upon the kind of people involved. To the man who is hell-bent

on striking, I suppose these are just five way stations on the road to crucifixion. To the man who wants an agreement regardless of its nature, these are only five questions to be answered for a free trip to Hawaii. (Isn't that where you celebrate the conclusion of your negotiations?) But to the man who has a serious interest in the terms of public employment, these are signs to stop, listen and think.

There is no panacea for resolving disputes among reasonable men, much less among unreasonable men. The advisory Council has urged the adoption of a series of measures that have had some success in satisfying the needs of management, labor, and the public. It has avoided some of the pitfalls that go with all human schemes; and it has given us a program that makes sense and is certainly worth trying. I believe any legislation in this field will be provisional and experimental; and the Council's proposals offer a path for experimentation in the right direction.

I don't think that this is going to be a Magna Charta for labor or a Bill of Rights for management, but it may help establish some of their basic rights. President Green of the AF of L, in a moment of excessive exuberance, called the Wagner Act the Magna Charta of labor. Ever since I've preserved a little essay that was written about the Magna Charta. It may reflect somewhat your predicament as you contemplate all of the things you've heard today. The Advisory Council's Report is highly technical, and it is full of a great many details. Those of you who have not classified and pigeonholed all of the proposals, may be a bit bewildered. If so, you might be in the position of the schoolboy who wrote this about the Magna Charta:

> "On a beautiful evening in August, 1582, Queen Elizabeth entered the ancient town of Coventry, and divesting herself of her clothing, mounted on a snow-white stallion and rode through the principal streets of the city. On her way she met Sir Walter Raleigh, who observed her naked condition, threw his cloak about her crying, 'Honi soit qui mal y pense'"

which our young author translated to mean,

> "'Thy need is greater than mine.' The queen graciously responded with 'Dieu et mon droit,'

which the youngster translated as "My God, you're right!"

So I think if you read the Report of the Advisory Council and you absorb its technical and foreign terminology, you may not have a Magna Charta; but you will at least have an interesting ride toward industrial peace.

THE CANADIAN EXPERIMENT IN PUBLIC SERVICE STAFF RELATIONS: A REVIEW AND ASSESSMENT

Jacob Finkelman, Chairman
Canadian Public Service Staff Relations Board

There are some to whom the essence of life is to seek to accomplish what no one else has ever succeeded in doing - to climb an unscaled peak, to reach the pole, to jet to a distant star. For these people, the risk of the unknown, the challenge of overcoming unforeseen hazards is what makes life worthwhile. Most of us, however, would prefer to thrill to these risks in vicarious fashion. It is comforting to know that someone has preceded us in exploring the unknown and that the dangers that were encountered are not quite as frightening as we anticipated. I gather that this is the reason I was asked to address you this evening. I am frank to admit that I myself fear the unknown and, when I first entered upon my duties, I sought comfort in the experiences of others.

The Public Service Staff Relations Act was enacted by the Parliament of Canada in February 1967 and came into force in March of that year. It has been variously described as Canada's bold experiment and Canada's folly. My own assessment, biased though I readily admit it may be, is that it was a rather daring innovation in its conception and that it has worked well. There may have been misgivings when the legislation was first introduced as to whether it would destroy or undermine what were thought to be the traditional relationships between the government and public servants. There may also have been misgivings that the government might be deprived of its power to govern in the public interest. We don't hear much of these misgivings at the present time in Canada. I believe it is fair to say that the legislation is

universally accepted. That is not to say that it is regarded as a perfect instrument. It has become apparent that there are shortcomings in the legislation and, on April 17 of this year, I was charged by the Government of Canada with the responsibility of examining the Public Service Staff Relations Act and its administration and to make recommendations, having regard to the experience gained since that Act came into force, as to how it should be amended or revised in order to meet more adequately the needs of the employer and the employees in the Public Service and the interest of the public. Needless to say, it would be unseemly for me to give any indication to this audience as to what changes in the legislation I would favour. At this early date I have a completely open, although I will readily concede not a blank, mind on these matters. Indeed, I welcomed the invitation to come here today because I was anxious to learn what was being said about the report of Ben Aaron's Committee on a related subject.

In outlining for you the provisions of the Public Service Staff Relations Act and how they have worked in practice, I am doing no more than reciting to you the experience in public service bargaining of the jurisdiction in which I operate. I would not have you read into what I have to say any suggestion that the federal law on public service bargaining in Canada is readily adaptable to conditions in the State of California or any other jurisdiction in the United States or for that matter in any other jurisdiction in Canada. The body politic is just as likely to reject transplants as does the human body. Political innovations in one jurisdiction can only be adapted to the needs of another jurisdiction with the greatest of caution. Perhaps I should point out that the federal body politic in Canada was probably more tolerant of the innovation of public service bargaining because our legislation was enacted against a background of public service bargaining for local government

employees under the general labour relations legislation going back to 1944. Incidentally, the tradition of local government autonomy, or sovereignty, so much a feature of the political scene in the United States, has never become entrenched as a fundamental principle of local government in Canada. Another important distinction between the situation in Canada and in the United States is that, north of the border, we live under the parliamentary system. As a result, those who bargain for the Federal Government in Canada are vested with a mandate that is not likely to be overruled by a sovereign legislature. With these preliminaries and comments out of the way, I shall devote the remainder of the time at my disposal to a brief analysis of the main features of the Public Service Staff Relations Act and some observations on how it has served the interest of the parties and of the public in the six years that it has been in operation.

The Public Service Staff Relations Act is a labour relations act which, in part, embodies most of the features of your national labour relations legislation. Employees are guaranteed the right to self organization in employee organizations of their own choice free from interference by management types. They are also guaranteed the right to bargain with their employer through an employee organization that represents the majority of the employees in an appropriate bargaining unit. The Act contains a code of unfair practices deemed requisite to protect the right to self organization and creates machinery - an independent, tri-partite representative board, the Public Service Staff Relations Board which performs the functions usually vested in a labour relations board - for investigating complaints that this code has been infringed. Bargaining rights flow only from certification, not from voluntary recognition; but contrary to the situation under your national labour relations legislation, certification may be granted by the Board on the basis

of a card count without a representation vote, although discretion is vested in the Board to direct the taking of a representation vote if it deems it advisable to do so.

The Committee that was charged with responsibility for framing the legislative machinery - the Preparatory Committee on Collective Bargaining in the Public Service, which was chaired by the late Arnold Heeney, a senior civil servant and former Canadian Ambassador to Washington - was faced with the problem that there were no recognized norms for determining bargaining units in the public service. To have left the issue of the appropriateness of bargaining units to be determined in each case by the Public Service Staff Relations Board, the usual approach in labour relations legislation, would have created a chaotic situation, with innumerable staff organizations vying with each other for "a piece of the action". By way of illustration of what may happen in such circumstances, I understand that in one proceeding before the New York Public Employment Relations Board there were 80 applicants and interveners. The solution devised by the Heeney Committee was to provide for the classification of employees of the central administration into 72 predetermined service-wide occupational groups, each of which was to constitute a single unit during the initial two-year period of the operation of the legislation, with discretion vested in the Board to divide each occupational group into supervisory and non-supervisory bargaining units if it saw fit to do so. This approach helped to preserve the integrity of the Board, since in the main, it relieved it of the odium of having to judge between conflicting claims of rival employee organizations concerning the composition of an appropriate bargaining unit.

The rules of the game for the conduct of organizational campaigns were therefore established and known at the very outset and employee organizations

were able to devote their efforts to organizing the employees in the predetermined bargaining units rather than exhaust themselves in establishing footholds in fragments of an occupational group in the hope of having their claims to certification for a small bargaining unit ultimately recognized by the Board. Organization of employees in the public service, following the coming into force of the legislation, proceeded at a phenomenal pace. Within two years, about 98% of the employees were in bargaining units for which bargaining agents had been certified by the Board. There are presently 108 functioning bargaining units comprising some 225,000 employees; 80 of the units are in the central administration and 28 comprise the employees of a number of boards, commissions and miscellaneous agencies called separate employers.

Once an employee organization has been certified as the bargaining agent for a bargaining unit, it is entitled to call on the employer to commence to bargain with it in good faith with a view to entering into a collective agreement. It is a fact of industrial life that there are some instances in which impasses are reached in bargaining, and it is in the provisions for the resolution of impasses that the Public Service Staff Relations Act introduces a novel concept. At the time the legislation was first under consideration, some employees in the public service were averse to resorting to the strike; some, especially those in the Post Office Department, vehemently asserted that they would not accept legislation that did not recognize the right to strike. In what some may regard as a typical Canadian fashion, a compromise was struck. The right to strike was granted to those that wanted it, and for others, arbitration of interest disputes was made available. The mechanics of the choice are as follows: After a bargaining agent has been certified for a bargaining unit and before it can give notice of its desire to commence bargaining, it must notify the Board as to which of two dispute

resolution processes it selects for that particular unit. One of the options is arbitration; the other is reference of the dispute to what we call a conciliation board - which is similar to, but not identical with, what is known as a fact-finding board in your country - and the selection of this option ultimately entitles the employees in the particular bargaining unit concerned to engage in a lawful strike. The selection of process is not binding for all time. It can be altered for each new round of bargaining, but must be altered before the bargaining begins. I shall deal briefly with each of the two processes but, before doing so, I must stress the fact that the choice of process rests exclusively with the bargaining agent and cannot be vetoed by the employer.

If the parties are unable to resolve their differences where the bargaining agent has specified arbitration as a dispute resolution process, either party is entitled to refer the items in dispute for final and binding arbitration by a permanent, independent, tri-partite Public Service Arbitration Tribunal. For any particular case, the Tribunal consists of a neutral chairman and one member drawn from each of two panels, one representing the interest of employees and the other representing the interest of the employer. Awards of the Tribunal do not normally contain reasons and the "representative" members are not permitted to make any report or observation concerning the award.

The Tribunal does not mediate between the parties; it is a quasi-judicial body. One of the accusations often made against arbitrators dealing with interest disputes is that they operate in space and are completely untrammeled and uncontrolled. The Public Service Staff Relations Act has sought to avoid this criticism to a degree by establishing a set of guidelines that the Tribunal is required to consider in making an award. They

are as follows: the need of the public service for qualified employees, conditions of employment in similar occupations outside the public service, the need to maintain appropriate relationships between different occupations in the public service, the need to establish fair and reasonable conditions in relation to qualifications and responsibilities, and the list concludes with an open-ended qualification - any other factor that appears to the Tribunal to be relevant to the matter in dispute.

When the dispute resolution process specified for a particular bargaining unit is the conciliation board option, there is a mandatory pre-condition to the bargaining agent calling a strike; the bargaining agent must apply for the establishment of a conciliation board if an impasse in negotiations is reached. A conciliation board is a tri-partite ad hoc body, each party nominating one member and these two members selecting a chairman; in default of their agreeing on a chairman within five days after they have been appointed, authority to appoint the third member of the conciliation board is vested in myself as Chairman of the Public Service Staff Relations Board. The function of a conciliation board is two-fold: (a) to assist the parties in reaching agreement, and (b) if it does not succeed in this endeavour, to report to me its findings and recommendations for resolving the dispute. The report is sent to the parties forthwith after it is submitted and in practice is always made public 48 hours thereafter. The time within which the conciliation board must report is fixed by statute but may be extended by agreement of the parties or by myself in the exercise of my discretion. It has been my practice not to extend the time except after consultation with the members of the conciliation board and the parties and then only if I am convinced that the conciliation board has a reasonable hope of bringing about agreement between the parties.

The recommendations in the report of a conciliation board, as in other jurisdictions in Canada, are not binding on the parties. Where the bargaining agent has chosen the conciliation board option, the right to engage in a lawful strike accrues to the employees in the bargaining unit after the lapse of seven days from the submission of the report of the conciliation board. However, some employees in such units are forbidden to strike at any time, even though their fellow employees in the same bargaining unit may have the right to do so. These are employees whose duties consist in whole or in part in the performance of a service which is or will be necessary to the interest of public safety or security. The identification of these employees is left in the first instance to the parties themselves. If they are unable to agree as to whether any particular employee is performing the essential duties just described, authority to make the requisite declaration is vested in the Public Service Staff Relations Board after hearing the parties, and the decision of the Board is final and binding.

In addition to the forms of third party intervention in impasses that I have already mentioned, the Act does provide for the appointment of a single conciliator, but only at the request of either party to a dispute and, for all practical purposes such a request must be made before a reference to arbitration or to a conciliation board has taken place. This statutory limitation on the appointment of a conciliator has not deterred us from appointing a person, whom we describe for cosmetic purposes as a mediator, even though no request has been received by either party and even after one of the parties has requested arbitration or the establishment of a conciliation board. Lacking statutory authority, the appointment can only be made on consent of the parties, and there have been times when the consent, expressed or implied,

has been extracted from them through a certain amount of gentle, or not so gentle, arm-twisting. At times one has to resort to what are known as the arts of diplomacy in all their various froms. Mediators have also been appointed in the same way after a strike has occurred and while it is in progress.

So much for what one might call the framework. What has been the experience with the impasse resolution processes in the Federal Public Service of Canada over the last six years? As of May 1, 1973, arbitration is the process presently specified for 91 bargaining units and reference to a conciliation board is the process for 17 bargaining units. There have been a few instances in which bargaining units have been switched from one process to another; while the score remains about the same as to the number of units under each process, the population in the units that have altered their option from arbitration to the conciliation board is larger than those that have gone the other way - one of the units that has abandoned arbitration is a large general labour and trades, a blue-collar unit.

During the six years since the Act came into force, some 262 agreements have been entered into. Included in this number are instances in which the Arbitration Tribunal made an award because, in all cases that did go to arbitration, the parties subsequently entered into an agreement embodying not only the terms of the award but also terms and conditions that had been agreed to apart from the award. Approximately 62% of the agreements were concluded without resort to third party intervention; i.e., through the efforts of the parties in direct bargaining across the table and without calling in a conciliator, a mediator, the Arbitration Tribunal or a conciliation board. A conciliator or mediator has been assigned and has been successful in reconciling the differences between the parties in about 20% of the cases; an arbitral award has been issued in slightly less than 13%;

and a conciliation board has been established and has reported in somewhat over 5% of the cases. I should point out that, in a number of instances where a reference to the Arbitration Tribunal or to a conciliation board had actually taken place and indeed in several cases after the Arbitration Tribunal had held a hearing in a dispute, the parties got together, reached agreement, and withdrew the reference either to the Arbitration Tribunal or to the conciliation board, as happened to be the case. Cases where this occurred are not included in the 13% and 5% figures that I just quoted. I think it is fair to say that, in the Federal Public Service in Canada, collective bargaining, like Jacques Brel, is alive and well, especially when one considers that the whole bargaining process is a rather new experience for the parties and one might have expected that there would be a certain alacrity to run to a third party for assistance on the least provocation.

The first round of bargaining in 1967 and 1968 was conducted in what I would describe as a honeymoon atmosphere. Both parties were anxious to conclude agreements, especially since increases in salaries had been delayed to some extent for several years in anticipation of collective bargaining being introduced. However that may be, the picture I have given you has not changed substantially in the later rounds. On the whole, one can safely say that, except for the year 1972 which can probably be accounted for by the peculiarities of the bargaining calendar, i.e., the particular bargaining units involved, there have been a few ripples in the ocean, but no tidal wave of disputes that the parties were unable to resolve through their own efforts.

Since the Act came into force, there have been 5 lawful strikes in the Public Service of Canada, 2 involved postal employees; 1, air traffic controllers, 1, electronic technicians; and the fifth some dockyard employees. It

may be of interest in this connection to note that the second postal strike did not involve a complete shut down of the postal service throughout the country; it was a rotating strike with the bargaining agent hitting one centre or several centres at a time for a day or several days. Incidentally, the third round of bargaining for the postal employees was brought to a successful conclusion this year without the bargaining agent calling a strike. The air traffic controllers strike was settled on the basis of an agreement that the issues remaining in dispute would be referred for final and binding arbitration by a third party, the person who had acted as mediator in the dispute during the course of the strike. To complete the picture, I should tell you that from time to time there have been sporadic work interruptions throughout the country that were not sanctioned by law. These were of relatively short duration and, in most cases, were caused by an accumulation of incidents of the sort not unknown in the private sector that frequently lead to wildcat strikes.

As a general rule in Canadian labour relations legislation - there are a few exceptions not here relevant - employees are not entitled to engage in a strike during the lifetime of a collective agreement. The Public Service Staff Relations Act incorporates a similar principle with no exceptions. Needless to say, there is a need in such circumstances for some machinery to resolve disputes that arise during the term of a collective agreement. The Act empowers the Board to make regulations in relation to the procedure for presenting grievances and these regulations are to have effect so long as they are not inconsistent with any relevant provision contained in a collective agreement. In other words, the legislation envisages that the parties to a collective agreement will establish their own grievance procedure; but until they have done so or in default of their doing so, the Board's regula-

tions in this regard will apply.

Early in 1967, the Board issued a regulation requiring every employer, i.e., the central employer and the separate employers, to establish a grievance process consisting of not more than four levels within each department or other portion of the Public Service, to appoint an authorized representative whose decision was to constitute a level in the grievance process and to inform each employee of the name and title of the person so appointed at each level. Each employer was also directed to prepare a grievance form which would call for the usual information required in such circumstances. The regulations also set out details as to the manner in which grievances were to be processed.

Grievances relating to the interpretation or application of a collective agreement or arbitral award that remain unresolved at the various levels of the grievance process may be referred for final and binding determination by one of a permanent corps of adjudicators appointed under the provisions of the Act. Altogether apart from the provisions of a collective agreement, employees have the right to process to adjudication grievances with respect to disciplinary action resulting in discharge, suspension or a financial penalty. Indeed the right to process such a disciplinary grievance right through adjudication is conferred not only on employees who are in a certified bargaining unit, but the right extends even to managerial and confidential personnel who are excluded from the collective bargaining provisions of the legislation. In addition, the grievance process itself is not confined to grievances arising out of the interpretation or application of a collective agreement or arbitral award or disciplinary action. Any employee who feels himself aggrieved by the interpretation or application in respect to him of any provision of a statute, regulation, bylaw, direction or other

instrument made or issued by the employer or as the result of any occurrence or matter affecting his terms and conditions of employment may file a grievance and pursue it through the various levels of the grievance process, if there is no other administrative procedure for redress available under some other act of Parliament. However, unless the grievance relates to a collective agreement or arbitral award or disciplinary action, the reply of management at the final level is conclusive and the grievance cannot be carried to adjudication.

The administration of labour relations legislation is usually entrusted to an independent commission. Such a body may be a public member tribunal or a representative tribunal. In the public service context, the manner in which the personnel of such a tribunal is selected presents a unique problem in that appointments are usually made by the senior executive of the jurisdiction and the executive. In the eyes of the employees, it can scarcely be divorced from the management establishment. I note that the Aaron Committee recommended that the board in the State of California be composed of three persons, broadly representative of the public, and that the Governor be required to make the appointments from a list of names submitted by a panel of impartial persons. Needless to say, the Government of Canada faced this problem as well. The scheme devised to ensure the neutrality and acceptability of the various functionaries under the Act is rather interesting. The Public Service Staff Relations Board consisted originally of a Chairman, a Vice-Chairman and eight other members. By a recent amendment, up to three deputy chairmen were added. The Chairman, the Vice-Chairman and the deputy chairmen are appointed by the Governor in Council for a term of ten years and are removable only by a process akin to impeachment. Four of the other members are representative of the interest of employers, and four

of the interest of the employees. The representative members are appointed by the Governor in Council for a term of seven years and are removable only for cause. I understand that the Vice-Chairman and I were selected only after the Government had consulted senior administrators and had conducted a sort of popularity poll among the employee organizations that were active in the Federal Public Service. A list of names was submitted to them and their preferences were taken into account. The four employee members were appointed by the Governor in Council on the recommendation of the four major groups of public employee organizations. The appointment of representatives of the employee interest to replace members who have resigned or have passed away has been made in the same fashion.

In the case of the Public Service Arbitration Tribunal, the appointment of the Chairman and the Alternate Chairmen is also made by the Governor in Council, but only on the recommendation of the Public Service Staff Relations Board. Neither the Governor in Council nor the Board can act alone. The same procedure applies to the appointment of adjudicators. The persons so appointed to the Arbitration Tribunal or as adjudicators hold office for a fixed term of years and may be removed only for cause on the unanimous recommendation of the Board. Since the Board itself is a representative Board, there is a built-in safeguard here to ensure that neutral persons would be appointed. The representative members of the Arbitration Tribunal are appointed by the Board itself on the nomination of the employers and employee organizations concerned respectively.

One of the important institutions in our collective bargaining set-up is the Pay Research Bureau. The Bureau was first established in 1957 as a unit within the Civil Service Commission, as it was known at that time.

> The task of the Bureau was to develop a programme of studies designed to produce information on the rates of pay and conditions of employment applying to particular occupations inside and outside the service.

This programme was intended to aid the Civil Service Commission in its functions relating to the making of recommendations on appropriate rates of pay for civil servants. The Heeney Committee recommended that the Pay Research Bureau be retained as an independent and impartial unit and be placed under the general administrative jurisdiction of the Chairman of the Public Service Staff Relations Board. Action to implement this recommendation was taken immediately upon the establishment of the Board in the Spring of 1967. Time does not permit an adequate analysis of the work done by the Bureau or an assessment of its contribution to the collective bargaining process. Suffice it to say that the contribution has been of inestimable value and that, to my mind, the process could not function effectively without the Bureau. As to the way in which it operates, I shall have to content myself with a brief statement extracted from the report of the Heeney Committee:

> The Bureau should be authorized to obtain such information on rates of pay, employee earnings, conditions of employment and related practices prevailing both inside and outside the Public Service as may be required to meet the needs of the parties to bargaining ... the Bureau should be required to make the results of its studies available to representatives of both the employer and the bargaining agent concerned ...
> ... The Director [of the Bureau] should be required to consult regularly with employer representatives and certified bargaining agents and should be free to seek and receive advice and guidance from the Chairman of the Public Service Staff Relations Board.

The Bureau has conducted itself in accordance with these recommendations. The advice and guidance referred to in the recommendation has, in practice, been given by the Vice-Chairman of the Board who happens to have been the first Director of the Bureau. He also serves as the Chairman of the Advisory Committee consisting of the representatives of the employer and of the certified bargaining agents as recommended by the Heeny Committee.

In this already over long outline of our legislation, I have so far avoided one topic that is of considerable interest in every jurisdiction concerned with public service bargaining - the scope of bargaining. I do not propose to comment on the philosophy or recommendations contained in the Aaron Committee Report on this topic. Nor am I in a position at this time to forecast what recommendations on this score I may make in my report on amendments to the Act. What I have to say to you today reflects the present state of the law.

The Act defines the term "collective agreement" as " an agreement ... containing provisions respecting terms and conditions of employment and related matters". Experience with other legislation couched in similar language both in Canada and in the United States indicates that the administrative agencies charged with the responsibility of construing such language have given it very wide application. The Public Service Staff Relations Act imposes a number of limitations both on the scope of bargaining and on the scope of arbitration by declaring certain subjects "off limits". I shall confine myself to a short outline of these limitations. A fairly extensive jurisprudence has developed as to the application of the limitations to particular proposals or demands of bargaining agents; time does not permit an examination of this jurisprudence. The rulings that have

been made are summarized in the Annual Reports of the Board.

No collective agreement may provide directly or indirectly for the alteration or elimination of any existing term or condition of employment or the establishment of a new term or condition of employment, if to do so would require the enactment or amendment of any legislation by Parliament. There are also four statutes that are "protected" not only as to the legislation itself, but also as to any regulation or order that may be made in the future under those acts. They are: Government Employees Compensation Act, Government Vessels Discipline Act, Public Service Employment Act and Public Service Employment Act which deals, of course, with the merit principle in many of its manifestations. Matters that are under the sole jurisdiction of the Public Service Commission and cannot be dealt with in bargaining include the following: standards, procedures or processes governing the appointment, promotion, demotion, transfer, layoff or release of employees.

In addition, the Act (Section 7) contains what might be called a "management rights" clause which reads as follows:

> Nothing in this Act shall be construed to affect the right or authority of the employer to determine the organization of the Public Service and to assign duties to and classify positions therein.

The construction that has been placed on this section is as follows:

> The section declares in unequivocal terms that nothing in the Act is to be construed to affect the right or authority of the Employer to do certain things. In other words, even if the Employer were to enter into some stipulation with regard to these matters, it would be free

> in law to repudiate the stipulation the very next day. If the Employer were to agree to include in a collective agreement a provision that limited its right or authority say to classify positions in the Public Service, it would not be bound by that provision. The Employer may nevertheless be prepared to give an undertaking to a bargaining agent that it would exercise its authority in respect of the matters listed in section 7 in a certain manner as evidence of its good faith an in the interest of promoting good industrial relations. The giving of such an undertaking may indeed, in some instances, be of considerable value in inducing a bargaining agent to accept terms or conditions which it might otherwise be reluctant to accept.

The scope of matters that may be referred to arbitration in the case of an interest dispute is narrower than the scope of matters that may be included in a collective agreement. An arbitral award may deal with rates of pay, hours of work, leave entitlements, standards of discipline and other matters and conditions of employment directly related thereto. Time does not permit a broad examination of the differences between matters that are negotiable and matters on which the Arbitration Tribunal is entitled to make an award. Two illustrations may cast some light on the problem. Thus, union security in the nature of maintenance of membership and the payment of a service fee by employees without the requirement of membership is a bargainable issue but cannot be dealt with in an arbitral award. Again, standards, procedures or processes of appraisal of employees, except to the extent that they may form part of the process of appointment or promotion, are also bargainable but not arbitrable.

One might think that, where matters are negotiable but not arbitrable,

there might be a tendency for the employer to take the position that, if the bargaining agent refers a dispute to arbitration, the bargaining agent will be "stuck" with an award confined to those matters that are arbitrable and that the employer will not enter into an agreement relating to other matters that are negotiable. I can say to you without hesitation that that sort of approach has not been evident. Indeed, there have been instances in which the employer has entered into an agreement on items that were negotiable but not arbitrable even after an arbitral award has been issued.

Some of you may be thinking that I have painted too rosy a picture of the process of collective bargaining in the federal public service in Canada and of the progress that has been made. I say to you without fear of contradiction that the Canadian experiment has been reasonably successful. To my mind - and I had almost 25 years of experience in administering labour relations legislation applicable to the private sector before I was appointed Chairman of the Public Service Staff Relations Board - the legislation has worked better than any knowledgeable person could have anticipated in the days when it was being conceived. Undoubtedly it has its shortcomings and I hope that some of them will be corrected in the near future. But I say to you, show me any new scheme of social legislation that emerges from the minds of its authors in a state of perfection.

PLENARY SESSION: REPORTS ON DISCUSSION GROUPS

ULMAN: This session, which like the first, is a plenary session, will be devoted to a series of short reports or impressions organized in the following manner: We will have reports by the opening speakers on the basis of their peregrinations from one meeting group to another today; these will then be supplemented by any additional comments which the chairmen of the discussion groups might care to make. That will be the business of this meeting.

I can, however, volunteer one piece of reporting myself. It was suggested to me that a meeting like this should require attendance by elected officials, who, according to our discussions, seem to be the missing employers. For that reason, I would specifically like to call our attention to the fact that one legislator has been at this conference, and I think all of us who are interested in this area of public policy owe a debt of gratitude to Assemblyman Russell, who has taken our opinions and views seriously enough - to say nothing of the legislation which he will be considering in an official capacity - to attend this conference. I want to express our gratitude to him for joining us and for participating in our discussions.

Now, we'll consider the speakers' reports in the order in which their papers were presented. The first speaker will be Reginald Alleyne. He will report his impressions on the general subject of coverage and implementation of rights in regard to the statute and administering agency.

ALLEYNE: Thank you again. I'll go through topics one through five, listed as "Some suggested questions for discussion groups."

First, is comprehensive coverage desirable, feasible, and are the exclusions all right? I think in regard to coverage, the answer is generally, "yes"; the comprehensive coverage is sufficient. There were some exceptions, which involve procedural ramifications more than substance. School personnel in many cases argued that their status is unique, and for that reason, they should be governed by separate considerations. There were a few arguments in favor of separate legislation, but not very many.

There was considerable feeling among the teacher group that the statutory definition of supervisor contained in the Moretti Bill is not adequate in respect to teachers. The reasons given generally were that teachers are policy makers on curricula and other matters. Since the definition of managerial employee in the Bill, reads: "Any employee having significant responsibilities for formulating and administering agency policies and programs ..."; all teachers are managers, within the meaning of that literal definition. Therefore, since managers are excluded from the Bill's coverage, teachers would not be covered by the legislation.

Certainly that was not the intent of the framers of the legislation. But that literal reading of the managerial employee definition might support the argument in favor of a separate definition of supervisor and managerial employee as applied to teachers, and perhaps to other groups of employees.

There are other problems with the definition of supervisor that might be discussed. The Council Report at page 97 says, "We believe that the status of supervisors should be the same as it is under the NLRA and the Wisconsin Employee Relations Act." I'm not sure that this statement in the report is correct. Actually, the National Labor Relations Act definition of supervisor and the Moretti Bill definition of supervisor differ in technically slight but substantively important respects. First, the National

Labor Relations Act provides that anyone who meets any one of the several statutory criteria contained in its definition of supervisor is a supervisor within the meaning of that Act; the Moretti Bill provides that one must qualify under all or most of the listed criteria. Thus, if the language of the National Labor Relations Act is applied, the class of persons within the statutory definition of supervisor is enlarged.

Some comments were made, and I think accurately so, that the words "all" or "most" in the Moretti definition of supervisor are unnecessarily vague. It's true that the more vague the language, the more work for the lawyers, and that in some cases, one can't help but use broad, fairly amorphous language that has to be left to the courts and agencies like a public employee relations board to resolve. But this may be going a bit too far. The framers might consider tightening up that language, so that it is at least necessarily vague, and not unnecessarily vague.

Second, it was pointed out, quite perceptively I thought, that the NLRA definition includes the power to direct employees, as one of the criteria in defining supervisory employees. The Moretti Bill is silent, and we might ask why.

I think I can guess. This might manifest a recognition of the fact that in the public sector there are more layers of supervision than there are in the private sector. In the public sector, every sergeant has his corporal, and every corporal has his private-first-class, etc., right down the line. I suppose one could argue that if the power-to-direct-criteria is included, a broad class of supervisors containing some employees not intended to fall within that definition might be created. My own view is that it might well be that the definition should be reconsidered in light of the unique position of, for example, teachers and perhaps police and fire personnel.

A possible alternative which comes to mind is to make no specific definition of supervisor in the legislation, but to set out some broad guidelines pursuant to which the Public Employee Relations Board, through its rule-making powers, would define supervisors in different employee group contexts. Thus, teachers, police and fire personnel, and perhaps other classifications that might have a unique status would be subject to the Public Employee Relations Board's appropriate definitions.

Next, preemption and local option. Here, the comments dealt primarily with the legality of the Moretti Bill's provisions. Constitutional questions were raised. They dealt with the question of whether or not the Bill might in fact conflict with the California Constitution by allowing, for example, a collective bargaining agreement to supersede State legislation.

On the issue of intent, the message of the framers of the Bill seems fairly clear, except perhaps as to minority hiring, where the Report suggests in a very vague way -- perhaps because they weren't too sure what to do -- that the preemption should not apply to agencies like the Fair Employment Practices Commission. Other conference participants discussed preemption in the context of their own situation. For example, a teacher suggested that a school board might insist that it can do away with tenure at the bargaining table and that this would be consistent with the Moretti Bill's provision that bargaining agreements may supersede State legislation.

The final issue that I should talk about in the time I have remaining is the selection-of-members issue. This drew considerable discussion in some sections and very little in others. Women and minorities tended to raise this subject more often than anyone else, and in the one group where the subject was not discussed, I noted that there were no blacks, no

Chicanos and only one woman. The question of three versus five members of the Public Employee Relations Board came up. Is three too small a number? Is there the possibility that too much pressure would be put on one person who might be caught between two "adversary types" in a given case? Others challenged the method of selecting the Board members and the nominees. Should the State Conciliation Service be involved when, in fact, the Director of that Service is the Governor's appointee and might be fired at the desire of the Governor? Should there not be nominees who are totally insulated from the gubernatorial appointing process? Should the FMCS have a nominating function in place of the American Arbitration Association or should the Triple A be used exclusively? All of these intriguing questions were raised by participants.

Now, the most telling blow to the Council's Report that I heard -- and while I haven't yet identified anyone, this was such a good point that I'm going to identify Mrs. Maloney -- points out that the Report says, "three members [of the Public Employee Relations Board] should be men of experience in the field"! Since the legislative history, if the Bill is passed in its present form, is going to be interpreted as an expression of the Legislature's intent, I think something ought to be done about this innocent bit of patent sex discrimination.

Finally, the power of PERB to select arbitrators, mediators and fact-finders was discussed. It was suggested that as the Moretti Bill is now drafted, PERB is restricted to consulting unions and employers in the selection of neutrals. There was some feeling, again coming principally from minorities, that this base should be expanded to include other organizations representative of the public interest to help assure that blacks, Chicanos, other minorities and women are selected as neutrals.

At page 11, section nine in the Council's Report, we have a statement authorizing PERB to collect data. In one group, there were strong feelings both ways on this issue. "Is the data considered sacred because it comes from PERB?", is the way one individual put it. My own thoughts are that perhaps PERB should not be involved in this function at all, because there might well follow a conflict of interest in a refusal to bargain case that comes before PERB. This might arise if PERB were actually involved in the collection of data which the parties subsequently used to support their prevailing wage positions at the bargaining table which was followed by an unfair practice charge arising out of those negotiations.

The last comment I have is that in two groups, a vote was taken, first in one group, and when I told the second group what had happened, they too voted on the same questions. I will close by telling you the results of the votes. Question one: Should the Moretti Bill pass in substantially its present form? In one group there were 10 yes votes, and 12 no votes. In the second group, there were 14 yes votes, and seven no votes. The next question put was: "Do you favor collective bargaining of any kind?" In other words, those who oppose all kinds of collective bargaining under any circumstances were given the opportunity to vote "no". In the first group, twenty-three voted yes, and four voted no; in the second, nineteen voted yes, and one voted no. That concludes my summary of the efforts of the various discussion groups.

ULMAN: We'll now hear from Harry Stark on Recognition and Representation.

STARK: The five major questions which were listed under this heading for discussion tended to blend and overlap so that it's difficult to take the conclusions and slot them one after the other. Consistency fell into

the criteria, and the supervisory definitions fell into exclusivity and security notions, so I can't very conveniently sort them in terms of those five questions. However, there were some things which developed that were consistent for all groups and I'll try to highlight those.

Although no votes were taken, the Report seemed to many individuals in the discussion groups, to be rather pro-employee in sentiment. In one group there were even statements to the effect that it looked like the Council wrote the Report in advance, the implication being they were predisposed to certain conclusions which were in essence pro-employee.

The most important issues which came out of the discussion groups dealt with the size of the unit and the time allowed for voluntary recognition to develop. There were several comments to the effect that the unit definition favoring the larger frame simply might not accomodate many situations, and that there's no great virtue in the size as such. One group very clearly expressed the thought that in the voluntary phase of recognition, there may not be sufficient time allowed for the employer and employee group or groups to iron out unit difference problems before they get to the Board. The phrasing of the statutory recommendation seems to require that as soon as there are two competitors for representation, the issue most go directly to the Board. "The employer shall refer it", according to the Report. Instead, might there not be some independent solution ironed out if the parties informally negotiate a difference in unit definition before reference to the Board? A question was raised whether the statute as written provides sufficient flexibility for this.

With respect to criteria, in one group there was a good deal of discussion about professionals and the relation between the special provision for professionals and other unit criteria. The treatment of supervisors,

managers, and professionals is immediately related to the unit criteria, and there were a good many people present in one or two groups from public schools and colleges, so the special character of education tended to dominate those discussions. In particular, there was a concern about collegial relationship versus bilateral negotiations and whether, in fact, the professionals and professors are different.

Some observed that professionals want it both ways. There wasn't any unanimity of opinion, but there was a good exploration of the problems that arise in attempting to accomodate special professional group interests. Some made strong comments to the effect that the Report seemed to favor industrial rather than trade concepts. They recognized that fragmentation wasn't wanted, but they were not necessarily in agreement that the large unit is best for bargaining relationships. It was left open with no clear consensus and all ranges of opinion on that matter.

In several groups, there did seem to be a general agreement, however, that the criteria might accomodate all needs, if they're properly used. For example, someone cited the case of community colleges, where the instructors may have a statewide community of interest, and yet the colleges are themselves rather autonomous. This situation might well be accomodated in terms of the ability of the employer to bargain and the authority structure of the several employers.

The matter of supervisory definition was very thoroughly covered. Some groups thought that there was no problem with the supervisory definition at all. Others felt that the Board will have to clarify the distinction between supervisors and management. They didn't have any trouble in accepting the exclusion, but the difference wasn't sufficiently clear.

Strong comments indicated that the Bill will have a good effect upon management by forcing it to clarify its own structure and thinking. There was a consensus in one group that the definition of supervision was acceptable, but they weren't agreed that supervisors should be excluded. However, neither was there an overwhelming consensus on their inclusion.

In connection with that, I want to make a comment about the use of a key word. The Report and the statute deal with the notion of supervisory responsibility. I think I understand, and the discussion groups understand what was meant by that, but perhaps a more appropriate term is "authority". Many people can bear responsibility. The question is one of power or authority. It might be that the phrase supervisory authority or managerial authority is clearer.

The question of exclusivity did not provoke much sharp difference. There were some comments about whether or not the Winton Act had been sufficiently tried to see if it could meet current needs. There were some observations that that the Winton Act does not solve unit problems. From the discussion, it seemed that behind the statement was the lack of exclusivity. Under Winton, all of the various competing employee groups get mixed in, and it is difficult to bargain with a variety of certificated or non-certificated employee groups. It wasn't an explicitly clear conclusion, but some expressed dissatisfaction that the unit problems were not resolved, and somehow that this was related to exclusivity. No one specifically used the phrase "certificated employee council", but I got the impression that that assortment of bargaining agents or representative conferral agents might have been meant.

We could have dealt with security under exclusivity or supervisory

definitions or the notion of security and individual and minority rights. On the issue of security and minority rights, one person said the minority has no rights. There wasn't a great deal of discussion beyond that. I think if we put together criteria and consistency of objective, and exclusivity, there are one or two key notions which emerge. One group, in particular, felt very strongly that there should be an election in absolutely all cases. This was in a context which seemed to be more concerned with the protection of individuals' rights and democracy and freedom rather than the efficacy of bargaining, so I treated it under this question of security, individual, and minority rights.

So far as union security clauses or organizational security clauses are concerned, I did not hear a great deal of discussion related to that. Unfortunately because of the time sequencing and our splitting between four groups during two periods, I was in a group at one time in which they just could not get to this particular discussion. In this case, Professor Lee was kind enough to help me, but I may not be able to report fully on one or two of the other discussions and something may be omitted.

There was a question in one group over voting, and whether it was proper or democratic to have a conclusion reached on only a majority of those voting. They had some discussion of it, and finally took a vote themselves. The vote came out six to five in favor of recommending that it should be a majority of those in the unit. There was a feeling that the agency fee should be somewhat less than recommended in the Report, which would be fair since those people cannot vote on union affairs.

There was one other comment that was interesting, and maybe we can hear from some of the others on this. It dealt with the evidence that is used by the employer to determine whether the requesting organization does in fact,

represent the employees in the concerned group. The people who raised that question noted that the "evidence" refers to those who are already members. The Report says the evidence shall include proof of majority support in documenting the employer's consideration of the request for recognition. The basis can be dues deduction authorizations or other evidence such as notarized membership lists or membership cards or "petitions designating the organization as the employees' collective bargaining representative."

The group feeling was that the emphasis seemed to be on requiring the employees to be members of the organization in advance, in order to get a proper vote, or to have their weight properly felt, because the evidence seems to be evidence of membership. The concern was about the freedom of people to choose or reject representation. This choice is related to the security clauses, and we should understand that some individuals in employment when organizations are contesting for bargaining rights may not be fully aware of the technical meaning of what they are doing.

Are they signing a membership card or dues deduction authorization or simply a note that they are willing to have some particular agency represent them -- without a commitment to membership? For someone who's unfamiliar with the technical differences, it may not be consistent with giving people free choice. Is there enough time at the instance of request to an employer for recognition to allow these things to be worked out so that people understand them? Is recognition going to be granted early, or will it be sent to the Board before there has been full opportunity to work out the voluntary procedures?

ULMAN: Bob Doherty will report on his findings on The Scope of Bargaining, which was a very lively subject of discussion in some places.

DOHERTY: There are only three observations that I would make, based upon what I believe to be key points emerging from the group discussions. First, there is still some confusion as to what is indeed intended by the proposed statute. Stemming from that confusion, two views emerge. One is that if we are going to have collective bargaining, then probably the parties ought to start with a clean slate, unrestricted by competing statutes and ordinances. This would eliminate the possibility of one of the parties merely bargaining upward from certain guaranteed benefits existing in alternative legislation.

Another concern that emerges from the confusion is based upon the preemptive language of the bill, which says, in effect, that if the parties agree on a particular provision that is in conflict with another law, that law is rendered inapplicable to that particular jurisdiction. The fear is that the tentacles of the proposal may reach into places where even legislators and writers of reports ought not to tread. There is, instead, a preference for a more selective repeal of existing legislation. An example that came up in several of the sessions was the tenure law. Most felt that that statute could be repealed, leaving it to the parties to negotiate job security provisions.

The second observation is that members of the discussion groups seemed to agree with the Council that it is probably a fruitless endeavor to have management rights provisions spelled out in the statute itself, or otherwise legislatively attempt to restrict the scope of negotiations. At least that appeared to me to be a majority view.

The third observation relates more to collective bargaining generally than to the mere scope of bargaining. It is this -- many participants were fearful that bargaining might engender a collusive arrangement between the

parties; the influence of other parties of interest on matters effecting manpower policy would thereby be blunted. It was thought by many that labor and management representatives may have narrow interests that do not coincide with the broader social goals of civil rights and affirmative action. Thus, it was felt that the remedies for such long-standing social injustices as racial, sex, and age discrimination ought to be dealt with in the political realm since it is possible (perhaps probable) that both parties at the bargaining table may have strong incentives for doing business at the same old stand in the same old way.

ULMAN: Our final report will be given by David Ziskind on Dispute Resolution.

ZISKIND: I attempted to ascertain to what extent the opinions of the participants on impasse resolution techniques were based upon personal experience or based upon general philosophy and theory. So, I asked each group if they would recite their experiences with strikes and the use of various methods of avoiding strikes. They reported about 15 to 20 strikes.

In no single instance had anyone attempted to utilize all of the devices recommended by the Advisory Council.

I'll run hurriedly through those strikes so that you can get an idea of what were the real experiences of the participants with impasse resolution techniques.

The University of California strike which lasted for ten weeks involved some critical collective bargaining. There was no mediation or factfinding except that there was joint factfinding between the parties; not through a neutral. After the strike, the parties decided to have advisory grievance arbitration.

There were several California strikes of welfare workers in which in addition to bargaining, there was political pressure. The effort to avoid a strike was through political influence and nothing else.

In a Redwood City strike, lasting 33 days, advisory grievance arbitration was offered. Binding arbitration was demanded by the union. A study of the situation was recommended by management and rejected by the union. The strike was held, and after it was over, there was an agreement on advisory arbitration.

In the Centinella Valley High School strike, there was critical bargaining. Factfinding and recommendations were requested by the union and rejected by management. The workers were out for one day (and incidentally won pay for the day they were on strike).

In San Francisco, there was a strike in which there was only critical bargaining. A good many unions were involved, and nurses apparently had some difficulty in offering to maintain health facilities because other crafts were not cooperative.

In the California State Employees Association four-day strike, no impasse procedures were attempted.

In Pasadena, an ordinance proposed voluntary mediation and factfinding. Both were rejected by management. The ordinance also called for an impasse meeting, but on the day of the impasse meeting, the impatient laborers went on strike. In that case, recommendations of the negotiators were rejected by the union. There followed a strike, and ultimately the acceptance of the recommendations of the negotiators.

In San Diego, there were three strikes. City officials took an adamant position and refused to consider anything beyond what they called a final

offer. Labor suggested mediation; it was rejected by the city officials. Once the manager for the city had a conciliator in his office, standing by, ready to work; but the city officials wouldn't accept him. A strike was held and after the strike, city officials decided to have a blue ribbon committee undertake factfinding.

In the San Joaquin School District, there was an emotional explosion during the bargaining procedure. The School Board refused to listen to any outsiders, and a strike was called.

In Sacramento County, there was a threatened strike, in which one of the members of the Advisory Council was called in as a mediator, and the dispute settled.

In Contra Costa County, the parties wouldn't agree that there was an impasse. The union asked for a mediator, as provided for in the county ordinance, and that was rejected by management. The union asked for fact-finding, and that was rejected. After the strike, there was an agreement to accept arbitration of grievance disputes, instead of the customary civil service hearing procedure.

In Berkeley, apparently management spokesmen said everybody understood that was the year labor was going to strike, come hell or high water. No efforts were made to resolve the impasse. They just took the strike, and eventually called in a mediator who brought about a settlement.

In a Concord five-day strike, negotiations were continued throughout the strike. The union proposed mediation, management objected and the strike was finally settled.

In Vallejo, Police and Firemen struck for five days. An agreement was

reached by the negotiators, and turned down by the City Council. Labor asked for arbitration; that was refused. Then a new charter provision was obtained, which provided for final and binding arbitration. The most recent, or perhaps the first, award that was rendered is now being challenged in the court.

A Sacramento Firefighters dispute was essentially over whether or not there would be binding arbitration as a method of settling disputes. Management accused labor of not bargaining in good faith, not wanting to bargain, but wanting to go to arbitration instead. An ordinance made mediation mandatory, and they tried mediation, but that didn't work. The ordinance also made factfinding mandatory, but before they got into factfinding, the strike was called.

In the L.A. teachers strike, there was no mediation until after the strike. Mediation with recommendations followed. An agreement was then reached, and later set aside by courts.

That, I think, summarizes the reported experiences with impasse settlement techniques. My conclusion is that there was very little experience, very little resort to any special techniques to avoid a strike. In most of the strike situations, nobody paid much attention to the customary devices for strike-prevention; and strikes came about through various differences without resort to anything like the five-finger plan that the Advisory Council wants to create for the resolution of impasses.

Regardless of the lack of experience with impasse resolution, that didn't deter the people participating in our discussion from having definite opinions on the Council's proposals. A basic attitude I detected in quite a few people was implicit in the question, "What is easy for me in my job?" Management people didn't want labor strengthened by the provisions of

this Act. Some of the labor people didn't want to be held up by any impasse procedures. They felt that it would frustrate them and prevent them from going directly to a strike threat and effective action.

On the other hand, there were a number of management people who said that they thought strike pressure was a necessary element in the labor-management relationship, and that they were willing to see the right to strike recognized.

Another viewpoint, expressed rather forcefully by one of the labor representatives, was that the objective of the Council's report is to minimize strikes, and he said the proper objective is not to minimize strikes but either to equalize the bargaining pisition of people, or to seek economic justice. He thought what we need is not to try to avoid strikes at any cost, but to accomplish a good solution to the needs of both parties. Another person tried to express a similar objective, in another context, by saying he found that the report was deficient in that it did not incorporate specific provisions to protect the public or the consumer interest, and left the public at the mercy of labor and management.

Somebody said, "The big trouble is that we don't have the right attitude. There are too many people around who pray to God by saying, 'I beseech Thee, oh Lord to confound my enemies and sow dissention and strife; so that I may have a job, and may not perish!'"

I want to close with the observation that the Advisory Council has given us a much more reasonable alternative.

ULMAN: I'll now ask our discussion leaders whether they have any supplementary comments to make.

ALLER: I had the impression that I had an unusually lively, experienced,

and accommodative group. I was certain that if we had two weeks together, we could end up writing a good bill. We found only some relatively simple problems. One of those was how we could gracefully accomodate the existing personnel systems if we shift to a system of collective bargaining. Incidentally on that, I was startled to see - but it became very understandable as I reflected upon it - that management in some respects saw an opportunity through the collective bargaining process to eliminate one of the long standing personnel administration forums, namely civil service systems and the like. It's possible that they could see coming out ahead of the game. Tenure and all other existing rules would have to go, of course, and there'd be a relatively minor problem of working out public interest considerations. It was brought to our attention that the collective bargaining system might in a sense drift away from the existing requirements of all of us.

And finally, I discovered that there was really only one remaining fly in the ointment. I was peculiarly alert to this because I have a relatively minor interest in the issue. The one villain still in the picture, is the politician, who is pictured as totally undisciplined in the process, and consequently, the one individual that might upset the apple cart. As a minor public official, I took that to heart. As we move forward in a legislative stance, we will have to figure out some way of insulating the entire process from not only the public, but also from the public's representatives, namely, that interfering and unpredictable creature, the politician.

PRASOW: In my group, management significantly outnumbered employee organization representatives. There were twenty management people and five union people, but I must confess that the union people were most vocal and lively. I thought I was in a negotiation session where they were

negotiating provisions of this bill. We did take a vote on how many favored the Moretti Bill, and how many opposed it, and the vote was twelve opposed and ten in favor. Three had no opinion, I might add.

The main objections to the Moretti Bill were five in number, some of which have been touched on already, but I'll go over them very rapidly. There was a feeling, particularly by management representatives that there is too much reliance on the NLRB - private sector model. This suggests that the bill does not adequately consider the need for special characteristics on the public sector, especially in the field of public education. The feeling was that there were different historical developments in the public sector and in public education; therefore, the bill should consider these more adequately.

Another objection was the unlimited scope of bargaining. There was a feeling among a number of management representatives that the recommendations are too broad, too unlimited. In a sense, one could bargain over everything.

The fourth objection was that the report is too permissive on strikes - not that the persons in the group were opposed to strikes. As a matter of fact, we took a vote and the result was twenty in favor of strikes, and four opposed - if the alternative were compulsory arbitration.

The final criticism was that the Bill fails to consider the rights of third parties. The public, variously defined as the consumer, the taxpayer, or the ordinary citizen, is not protected. This especially applies to those in minority groups. The broad scope of bargaining jeopardizes the civil rights of minority groups in that it may have an adverse impact on affirmative action programs and efforts to broaden employment opportunities for

minority members and women.

ABERS: With respect to the make-up of PERB, in addition to the question of representatives which was raised already, there was some feeling that the members of the board should be people who have some knowledge of government. The assumption is, I believe, that if they do not have this knowledge, they will simply transfer their experience from private industry to something which might be different. There was also some discussion of the third party matter expressed in terms of the public interest and the public good. Two things were said: One, that the contestants in the collective bargaining situation don't normally concern themselves with protecting the public interest. They're more involved, of course, with protecting their separate partisan interests.

There was also some of the traditional feeling that the public interest is in better hands when the custodians are management people than when they are labor people.

There was some discussion of the roles of other agencies. I was interested in what somebody else said earlier about the possibility of collusion. What was expressed in our meeting was that formal personnel systems have not normally been very attentive to the needs of social change, and that it might be just as well to take the opportunity to effect social changes in manpower situations out of the hands of the traditional civil service board.

There was a good deal of discussion about the denial to supervisors of the statutory right to organize collectively in their own interests. If I estimated the sense of the group correctly, I would say that the group which I chaired was rather strongly in favor of providing some firm mechanism so

supervisors could organize.

In regard to unit determination, we went round and round, without coming to any conclusion. I'd like to offer you something that I remember reading in a statement of Daniel Patrick Moynihan. Before he had the foresight to go far away from Washington, he said something like this: "I cannot give a definition of a unit, but I certainly can recognize one when I see it." Which may be all that we need to know.

The only other comment that I have to make is that there was a good deal of discussion about whether or not the provisions and procedures of the Moretti Bill will further or hinder the progress of true collective bargaining. This is not a debate in which you can come to any conclusion in the time that we have, but there seemed to be a majority feeling that the provision of some system, a system which does not now exist, would be good for the progress of collective bargaining in the public sector.

SCHNEIDER: Most of the points made in my section were covered well by the main speakers, so I won't recapitulate further. However, there were several points about which people felt strongly that I think weren't mentioned. Under the administrative agencies section, regarding appointment to the board, there was some feeling that because of the extensive experience elsewhere, the appointment procedure should be by the Governor with the advice and consent of the Senate. Perhaps this procedure would be more appropriate than embarking on an experiment.

In the impasse resolution section, it was the group's position - with several exceptions - that the compulsory acceptance of the factfinding report is equivalent to binding arbitration, and if any public employees are going to be granted the right to strike, all public employees should be

granted the right to strike. There should be no legislative requirements to compel the acceptance of a third party's resolution in interest disputes.

Lastly, there was a concern expressed at some length that the impasse provision of the bill misleadingly implies that the lockout is the management equivalent of the right to strike, when in fact, it is not a real option, and therefore, a relatively deceiving and meaningless gesture.

EATON: Dr. Ulman introduced this series of remarks by saying it was supposed to be impressions. Well, I'm going to stick my neck out and give you one whopping personal impression.

As we began this morning, we happened to begin on the scope of bargaining. It seemed to me that there was a general lack of experience on the part of most participants with the ideas that are embodied in the report, and in the bill which it introduces. At the same time, there was a great deal of fear and apprehension as to what the bill was going to amount to in practice. There was a failure to define exactly what this apprehension was, or to suggest clear statutory limits for the simple reason that there wasn't enough experience.

My general impression was, as we moved along through the day, that the Commission has hit it pretty squarely on the head in this sense: they had succeeded in building on their experiences in the private sector and from public sector experiences in other states. They had been successful in making, for example, bargaining units negotiable items, and leaving it to PERB or to practice to define the areas of dispute.

In other words, I got the distinct impression, and as I say I'll stick my neck out, that despite the adverse comments, this would be a bill that

almost everyone could live with. It would be an acceptable piece of legislation and it would work.

OETTINGER: There are only two comments which I would like to make in addition to what has been previously said. One was, there was fairly strong concern in our group that state preemption of local option ordinances might particularly effect school districts in an adverse fashion. And second, in the area of impasse resolution, there were strong feelings that there should not be strikes on grievance disputes, but that it would be desirable for the PERB to determine the rules for rights arbitration which would be evoked when the parties themselves could not reach an agreement on grievance resolution.

ULMAN: That concludes our final session. I think we owe a particular debt of gratitude to the Assembly Advisory Committee on Public Employee Relations. Whatever the fate of the legislation which has emerged from their study, they certainly have succeeded in presenting a comprehensive body of material for fruitful discussion at this conference. Transferring an institution which has worked tolerably well in one area into another involves a complex problem. My observation is that the discussion at this conference has not been grounded on ideological grounds nor on the smug assumption that what has gone over in the private sector for 25 years is uncritically transferable to the public sector. My thanks to all of you for your active contributions to this symposium.